Supreme Court, U.S.
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No. ____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

JO ANN LEFFEL,

Petitioner,

v.

VALLEY FINANCIAL SERVICES AND
VALLEY AMERICAN BANK AND TRUST COMPANY,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Where a Motion for Summary Judgment was granted against Petitioner in a case where Petitioner's complaint alleges violations of the Americans with Disabilities Act (ADA), was the Seventh Circuit Court of Appeal's interpretation and application of the burden shifting requirements regarding the showing of pretext as espoused in *St. Mary Honor Center v. Hicks*, 509 U.S. 562, 113 S. Ct. 2742 (1993), too restrictive?

2. Did the Seventh Circuit Court of Appeals err in concluding the district court properly applied the standards required for summary judgment where the undisputed facts, inconsistencies in the testimony of Defendants, and allowable inferences raise factual issues which should have been submitted to the jury?

TABLE OF CONTENTS

Page

Statement of Questions Presented i

Table of Contents ii

Index of Authorities iii

Opinions Below 1

Constitutional and Statutory Provisions 2

Jurisdictional Statement 1

Statement of the Case 2

A. Lower Court Proceedings 2

B. Statement of Facts 3

The Questions Are Substantial 15

A. The Seventh Circuit Court of Appeals Erred in Its Restrictive Interpretation and Application of the Burden Shifting Requirement Regarding the Showing of Pretext as Espoused in *St. Mary Honor Center v. Hicks* 15

B. The Seventh Circuit Court of Appeals Erred in Concluding the District Court Properly Applied Standards Required for Summary Judgment Where the Undisputed Facts, Inconsistencies in Defendants' Testimonies, and Allowable Inferences Raised Factual Issues Which should Have Been Submitted to the Jury 21

Conclusion 27

Relief Requested 28

TABLE OF AUTHORITIES

Page

CASES

Agostini, et al. v. Felton, et al., 117 S.Ct. 1332; 137 L.Ed.2d 492 (1997) 16

DeLuca v. Winer Industries, Inc., 53 F.3d 793, 797 (7th Cir., 1995) 16

DePriest v. Seaway Foodtown, Inc., 543 F. Supp. 1355 (1982) 20

Furnco Construction Corp. v. Waters, et al., 438 U.S. 567, 98 S.Ct. 2943 (1978) 19

Hayden v. First National Bank of Mount Pleasant, 595 F.2d 994 (1979) 20

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 36 L.Ed2d 668 (1973) 20

O'Connor v. Consolidated Coin Caterers Corp., 116 S.Ct. 1307 (1996) 16

Planned Parenthood of Southeastern PA v. Casey, 505 U.S. 833, 120 L.Ed.2d 674, 112 S.Ct. 2791 (1992) 16

Sanchez v. Lagoudakis, 440 Mich 496 (1992) 16

School Board of Nassau County v. Arline, 480 U.S. 273, 42 EPC ¶ 36, 791, 1 AD Cas.(BNA) 1026 (1987) 16

St. Mary Honor Center v. Hicks, 509 U.S. 502, 113 S.Ct. 2742 (1993) ..... *passim*

Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089 (1981) 22

U.S. Department of Community Affairs v. Burdine, 490 U.S. 248, 67 L.Ed2d 207, 101 S.Ct. 1089 (1981) 18, 19, 20

TABLE OF AUTHORITIES – Continued

Page

STATUTES & RULES

28 USC § 1254(1) 2

28 USC §§ 1291 & 1295 2

28 USC §§ 1331 & 1334(3) 2

42 USC §§ 12101, et. seq., 12101(b), 12102, 12112 ..2, 15

Supreme Court Rules Chapter III § 10 2

MISCELLANEOUS

29 CFR pt. 1630 app. § 1630.2(1) 15

Judge Overrules Jury In Deciding Discrimination, Lawyers Weekly USA, Issue 96-5, pp. 1 & 14 (February 26, 1996) 28

Report From the Committee On the Judiciary, Report 101-485, Part 3, May 15, 1990, pp.31 20

H.R. Rep. No. 485 pt.2, 101st Cong., 2d Sess. 50, 30 (1990) 16

S. Rep. No. 116, 101st Cong., 1st Sess. 21 & 23 (1989) 15

PETITION FOR WRIT OF CERTIORARI

OPINIONS AND ORDERS BELOW

Opinion of the Court of Appeals, May 15, 1997 affirming the District Court is recommended for full text publication and is appended.

Judgment of the Court of Appeals, May 15, 1997 affirming the District Court Judgment is appended.

Order of the Court of Appeals, July 10, 1997 denying Petitioner's motion for stay of mandate pending petition for certiorari is appended.

Order of the Court of Appeals, June 16, 1997 denying Petitioner's motion for rehearing en banc is appended.

Memorandum and Order of the U.S. District Court for the Northern District of Indiana, December 13, 1995 denying Petitioner's motion for reconsideration is appended.

Judgment of the U.S. District Court for the Northern District of Indiana, August 24, 1995 in favor of the Defendants and against Plaintiff is appended.

Memorandum and Order of the U. S. District Court for the Northern District of Indiana, August 24, 1995 granting Defendants' motion for summary judgment is appended.

JURISDICTIONAL STATEMENT

Petitioner seeks review of the Seventh Circuit Court of Appeals' May 15, 1997 judgment affirming the district

court's summary dismissal of petitioner's ADA claims pursuant to Supreme Court Rules Chapter III § 10. Petitioner filed a Motion for Rehearing En Banc which was denied by the Seventh Circuit Court of Appeals on June 16, 1997.

This is a civil rights action arising under the Americans with Disabilities Act, 42 USC § 12101 et seq. and, therefore, jurisdiction for the filing of this action in the lower district court was invoked under 28 USC § 1331 and § 1334(3). Jurisdiction in the Seventh Circuit Court of Appeals was based on 28 USC § 1291 and § 1295.

The jurisdiction to review the judgment of the Seventh Circuit is pursuant to 28 USC § 1254(1).

STATUTORY PROVISION

42 U.S.C. § 12101, et seq., The American with Disabilities Act (hereinafter "ADA") with pertinent text set out in the appendix which is appended hereto.

STATEMENT OF THE CASE

A. Lower Court Proceedings

Petitioner filed this civil rights action in the United States District Court for the Northern District of Indiana pursuant to 42 USC § 12101, et seq. arising from employment discrimination against Petitioner, leading to her termination from Defendant employer. [R. 1, Complaint and Jury Demand].

The District Court granted Defendants' Motion for Summary Judgment on August 25, 1995. [R. 67, Memorandum and Order Granting Defendants' Motion for Summary Judgment ("MSJ")]. The motion was based on a claimed lack of genuine issues of material fact meriting a trial. The District Court held that Petitioner had no direct evidence to support a charge of discrimination and had not presented any other evidence that would allow a jury, or a judge sitting as fact finder, to infer that Petitioner was treated adversely because she was perceived as having a disability. Petitioner filed a Motion for Reconsideration which was denied on December 13, 1995. [R. 74, Memorandum and Order Denying Plaintiff's Motion for Reconsideration].

Petitioner appealed the decision to the Seventh Circuit Court of Appeals, seeking reversal of the District Court dismissal of this action. [R. 75, Notice of Appeal]. The Seventh Circuit affirmed the lower court in its opinion entered May 15, 1997. Although Petitioners sought reconsideration, it was denied on June 16, 1997. All orders and opinions referenced above are provided in the Appendix.

B. Statement of Facts

I. Background

Petitioner Jo Ann Leffel is a person who suffers from Multiple Sclerosis, a progressively degenerative disease that attacks the central nervous system. She was hired by Valley American Bank (the "Bank") in 1980 as a bank teller. Over the next eight years she received a promotion to bank officer and another promotion to Branch Manager

in 1988, totaling thirteen years of service. [R. 47, Ex. G; R. 50, Ex. 4]. In February 1992, Ms. Leffel, at the request of the Bank administration, was given management responsibilities over three bank branches at one time. [R. 50, Ex. 7, pp. 335-336, Ex. 8, p. 32]. Ms. Leffel had never been reprimanded for any failure to perform nor any performance deficiencies, prior to the onset of discrimination. [R. 50, Ex. 4 & 5]. Ms. Leffel consistently earned average to above-average marks on her annual performance reviews during her tenure. [R. 50, Ex. 5 & 6; R. 70]. Defendants admit that Plaintiff was, at the very least, a competent employee. [Appellees' Brief on Appeal to the Seventh Circuit Court of Appeals, p. 3]. Also, as noted by her performance and promotion record, she was an excellent employee and qualified leader. [R. 50, Ex. 4 & 5]. Her last performance review, completed by Debi Peffley Banking Center Administrator and signed-off by Jerome Kearns, Bank Vice-President, gave her an overall rating of "2+" out of four, and a "4" rating on staff cooperation. [Debra S. Peffley Deposition, December 20, 1994, pp. 17, 64].

Prior to February, 1992, Ms. Leffel was the Branch Manager of the Downtown Mishawaka branch of Valley American Bank. However in February of that year, Ms. Leffel "very kindly offered to go and act as the manager of the west end branch on a temporary basis," in addition to overseeing the Mishawaka branch and serving as a mentor to the manager of the Kroger-Merrifield branch. [Peffley Dep., 12/20/94, 31-32]. The bank entrusted her with these important assignments. During her absence from the Mishawaka branch, Carolyn Teeter, Ms. Leffel's assistant, became acting manager. In the fall of

1992, Ms. Leffel returned to Mishawaka, reestablishing her previous position as manager of the branch and Ms. Teeter assumed her subordinate role. [Id.].

During her temporary management, Ms. Teeter was to report to Ms. Peffley. In January of 1992, Ms. Teeter was directed by the bank to report directly to Ms. Leffel. [Jo Ann Leffel Deposition, March 21, 1995, pp. 171]. Despite this order, Ms. Teeter continued to go over Ms. Leffel's head. It was only while the discrimination was occurring, during March 1993, that Ms. Teeter finally reported to Ms. Leffel and only after being directed again by the Bank to do so. [Leffel Dep., 3/21/95, pp. 175-176]. It is important to note that Ms. Teeter enjoyed a special relationship with the Chairman of the Board of the Bank, having been hired directly by him into a management trainee position with the title of Branch Manager, rather than through the Human Resources Department where she would have started as a bank teller and then eventually working her way up to the position of bank manager. [Carolyn Teeter Deposition, March 22, 1995, pp. 5-6; Leffel Dep., 3/21/95, pp. 173].

Sheila Swinehart was a part-time teller under the supervision of Ms. Leffel. She had been reprimanded by the Bank for failure to complete certain reports on time. [Margaret Andrysiak Deposition, December 20, 1994, pp. 24-26]. She denied the responsibility for this failure, citing Ms. Leffel as the cause of the incompletion.

From these facts, one can easily make the inference that these two employees, Ms. Teeter and Ms. Swinehart, the two who made the first complaints to the Bank superiors about Ms. Leffel, had motive to create a reason to

oust Ms. Leffel. Their knowledge and prejudice of Ms. Leffel's MS provided the basis for their wild and unsupported claims, which the Bank superiors used to support their discrimination against Ms. Leffel.

II. Discriminatory Events

a. Breach of Confidentiality – Bank Learns of Ms. Leffel's MS

In December of 1992, Ms. Leffel along with certain other employees, attended a meeting overseen by Margaret Andrysiak, Director of Human Resources for Valley American Bank and Jerome Kearns, Bank Vice-President, to review the Bank's new insurance plan. [Andrysiak Dep., December 7, 1995, pp. 55]. The agent for the new insurance carrier was Valley Insurance, a company with common ownership with Valley American Bank. [Teeter Dep., 3/22/95, pp. 119]. In fact, Valley Insurance is located on the same floor of the same building as the administrative offices of Valley American Bank, as well as Ms. Leffel's office. [Virginia M. Dreaves Deposition, April 19, 1995, pp. 30-31]. At this meeting, Ms. Leffel was required to turn in an insurance enrollment form to Ms. Dreaves, a representative of Valley Insurance, disclosing her MS. [R. 50, pp. 3]. The health insurance provider later called Ms. Dreaves for details concerning Ms. Leffel's condition, which she provided. In this follow-up call, Ms. Dreaves gave information to the insurance company including dates of hospitalization. [Dreaves Dep., 4/19/95, pp. 17]. Ms. Leffel had never given any of this information to the Valley Insurance prior to this time.

According to Ms. Dreaves, the insurance enrollment forms "come through the Bank" (Id. at pp. 14), specifically from the Human Resources Department and then are organized and mailed to the provider by Valley Insurance. Ms. Leffel was promised that this process would be confidential, especially regarding the Bank, yet Ms. Dreaves states that "what we get on the enrollment form goes to the employer." [Id. at pp. 28]. It was on the enrollment form that she was required to divulge her MS. Not only was Ms. Leffel lied to, she had her confidentiality breached by the illegal disclosure. Prior to this breach of confidentiality, neither Ms. Leffel's staff nor Branch Administration were aware of her condition. [R. 50, Ex. 4].

Later, Ms. Dreaves informed Ms. Leffel that she had specifically said that Petitioner had MS to a secretary in the Personnel Department. This secretary, in turn, relayed the knowledge to Ms. Andrysiak, Director of Human Resources for the Bank. [R. 50, Ex. 1, 4, 7, pp. 265-269, Ex. 9, pp. 520].

b. Vague and Unsubstantiated Claims

Following the disclosure from Valley Insurance to Valley American Bank, a series of events took place which directly led to Defendants' discrimination against Ms. Leffel, beginning with unsubstantiated reports of poor work performance levied against her and ending with the final insult of termination. A prominent fact about this course of discrimination is that from the time of the first reports of poor performance (the first ever raised against Ms. Leffel in all her thirteen years of employment with the Bank), in early March 1993 to

the date of her termination on April 8, 1993, lasted only approximately one month. [R. 47, Ex. A, B, C, L, & M; R. 50, Ex. 4, 7 pp. 207-208, 9 pp. 39-46, 12 pp. 100, 13 pp. 121-124; R. 67, pp. 7-8, 10-11; R. 69]. The short time frame from the first complaint to termination alone raises an inference of discrimination.

Beginning in early March, Sheila Swinehart, a part-time bank teller under Ms. Leffel's supervision, ignored the chain of command and alleged to Ms. Andrysiak, that a communication breakdown was occurring between the staff and Ms. Leffel. As well, Swinehart asserted numerous other supposed performance problems, including complaints that Ms. Leffel appeared to be "overly medicated" and acting "paranoid". [R. 50, Ex. 9, pp. 39-46; Ex. 12, pp. 100]. At this point, Ms. Andrysiak notified Debi Peffley, Bank Center Administrator and Ms. Leffel's supervisor of her conversation with Ms. Swinehart. [Id. at pp. 10-11].

At the request of Ms. Swinehart, a secret meeting was called at a local pancake house on March 9, 1993, to discuss the supposed problems. [R. 67, pp. 7-8, 9-10]. At this meeting were Ms. Andrysiak, Ms. Peffley, Lisa Curtis, one of Ms. Leffel's employees, and Carolyn Teeter, Ms. Leffel's assistant. Ms. Leffel was neither invited to nor informed of this meeting. During this breakfast meeting, Ms. Curtis and Ms. Teeter were allowed to further suspicions regarding Ms. Leffel's behavior and condition by reiterating numerous vague complaints, such as they felt uncomfortable working with Ms. Leffel. [R. 50, Ex. 8, pp. 29; Ex. 9, pp. 23-25, 33-40; Ex. 14, pp. 84]. Some of these included performance-based criticisms such as excessive

absenteeism, not receiving information and not completing reports (Id. at Ex. 6). At no time did these complainants present any sort of documentation to support any one of these claims. [R. 50, Ex. 9, pp. 70-71; R. 47, Ex. 10].

Based on this clandestine retreat, Ms. Andrysiak and Ms. Peffley forwarded the claims on to Jerome Kearns, Ms. Peffley's superior and Bank Vice President. At some point between March 9 and March 15, a decision was made between these three to put Ms. Leffel on probation, citing the claims of her subordinates. [Peffley Dep., 3/20/94, pp. 126]. How this process occurred is not clear, except that there was some collaboration at some point. How they arrived at the decision to put Ms. Leffel on probation is especially suspect. Mr. Kearns' only source of information regarding Ms. Leffel came from Ms. Andrysiak and Ms. Peffley. [Jerome Kearns Deposition, 12/7/94, pp. 45]. Ms. Andrysiak, at the time, had no written information as to Ms. Leffel's performance, as she relied totally on the unwarranted claims of Ms. Teeter and Ms. Swinehart. [Andrysiak Dep., 12/20/94, pp. 11-13, 16, 19-22, 30-31, 36-38, 55; Andrysiak Dep., 12/7/94, pp. 34-41]. Ms. Peffley testified that she had extremely limited personal knowledge of any of the claims made by Teeter, Curtis and Swinehart. [Peffley Dep., 3/20/94, pp. 70]. Thus, at some point between the pancake house meeting of March 9 and the probation meeting between Kearns, Peffley, Andrysiak and Leffel, a decision was reached, without supporting documentation but on the reliance of the word of subordinate employees with motive to undermine Ms. Leffel's position at the bank, that Ms. Leffel would be put on probation. [Peffley

Dep., 3/20/94, pp. 86; Kearns Dep., 12/7/94, 53; Andrysiak Dep., 7/20/94, pp. 46, 75].

Despite the lack of any sort of evidence regarding the claims of the complaining employees, neither Andrysiak, Peffley nor Kearns ever investigated the veracity of the claims made against Ms. Leffel. At no point was the remainder of Leffel's staff at the Bank asked if they had experienced dissatisfaction with Ms. Leffel. [Andrysiak Dep., 12/20/94, pp. 43; R. 50, Ex. 9, pp. 70-71; R. 47, Ex. O]. At no point prior to being put on probation was Ms. Leffel informed of these complaints, nor was she given the opportunity to face her accusers or to respond to the allegations made against her. [Peffley Dep., 3/20/94, pp. 69]. In other words, a conspiracy of silence against Ms. Leffel was made to ensure that the bogus claims would stand uncontested until the "supporting" paperwork could be finalized and presented to Ms. Leffel at the probation meeting of March 15, 1993.

The evidence shows, however, that the decision to terminate Ms. Leffel was made as early as March 9, the date of the pancake house meeting and that the decision was made despite the knowledge of Ms. Leffel's MS. According to Ms. Peffley's notes of that date, she was thinking that there was a medical condition she was dealing with and that "medical leave could cause financial burden." She also wrote that Ms. Leffel "must take off at least 30 days with pay or could take medical leave or termination." [Peffley Dep., 3/20/94, pp. 107-122].

On March 15, 1993, Ms. Leffel was summoned to a disciplinary meeting in the office of Bank Vice-President Jerome Kearns, along with Ms. Peffley and Ms.

Andrysiak. [R. 50, Ex. 4]. At this session, accusations were made against Ms. Leffel, not only including vague references to her "medical" situation [R. 67, pp. 10-13; R. 50, pp. 6; R. 47, Memorandum by Defendants In Support of Their Motion for Summary Judgment, pp. 3], but also referring to her alleged poor work performance, noting, for example, her lack of communication with customers and staff, despite excellent performance ratings in both categories [R. 47, Ex. K]. To support their charges, Defendants manufactured a report that listed ten areas of concern, handing this report to Ms. Leffel with no further clarification, except to have Mr. Kearns read the report verbatim. Ms. Leffel was given no further information, even when she would ask for explanations in order to correct the alleged concerns. [R. 50, Ex. 4 & Ex. 7, pp. 221]. At no time did Defendants suggest goals for Ms. Leffel to reach, nor did they suggest a means for measuring any progress towards meeting Defendants' unsupported demands. Not only was Ms. Leffel subjected to unsubstantiated allegations, she was not allowed to defend herself, nor did she have any way to formulate a plan to somehow meet Defendants' expectations. [R. 50, Ex. 4 and Ex. 7].

One major complaint listed against Ms. Leffel that Defendants rely heavily on is her timeliness in turning in reports, the lone deficiency noted on her performance review of December, 1992. [R. 50, Ex. 4 and Ex. 7, pp. 221]. At this time, Ms. Leffel was managing two bank branches at once and was therefore forced to prioritize her time. In fact, almost all of the complaints charged to Ms. Leffel can be explained by the fact that she was managing two branches. It is remarkable that more minor

details and clerical work did not get accomplished. Ms. Leffel worked overtime to satisfy the Bank's needs and its requirements of her, meeting and exceeding expectations for such a difficult task. [Leffel Dep., March 22, 1995, pp. 335-336; Peffley Dep., 12/20/94, pp. 32].

Ms. Leffel was put on a 30 day probationary status. Her assistant, Ms. Teeter was then put in charge of "monitoring" Ms. Leffel's performance, reporting directly to Ms. Peffley. [Leffel Dep., pp. 135-136; Teeter Dep., 3/22/95, pp. 65-67]. Ms. Leffel was also made to sign two documents, "Expected Standards of Performance" and "Probationary Status Effective March 16, 1993", despite the fact that she had no knowledge of any deficiencies discussed prior to this meeting and had voiced such concerns to Kearns, Peffley and Andrysiak. [R. 47, Ex. L & M; R. 50, Ex. 4]. The claims made against Ms. Leffel and her probation become especially suspect when compared to the discipline meted out to Joanna Price, another branch manager, who for more serious charges, was merely transferred rather than put on probation or terminated for her poor performance. [R. 50, Ex. 25].

Throughout the entire meeting, efforts were made to suggest that Ms. Leffel's medical condition was affecting her work. Ms. Leffel denied that her illness was affecting her work. The Bank superiors, nevertheless, threatened her with three options: 1) Ms. Leffel should request an unpaid personal leave of absence; 2) request a paid medical leave of absence; 3) or resign. [R. 47, Ex. A, B, & C; R. 67, pp. 11-12]. Although Ms. Leffel did not request long-term disability (LTD) benefits, she was given a form for LTD that she was required to fill out while given no guarantee she would qualify, and knowing herself that

her lack of MS symptoms would disqualify her from LTD benefits. [R. 50, Ex. 13, pp. 25; R. 67, pp. 11-12]. In fact, if Ms. Leffel did not acquiesce to the LTD, Mr. Kearns had already decided to terminate her. [R. 50, Ex. 13, pp. 68 & 132].

At the end of this meeting, the Bank superiors further demeaned and discriminated against Ms. Leffel by ordering her to inform her staff that she had MS, even after she protested. [R. 50, Ex. 7, pp. 202; Ex. 9, pp. 72].

Less than thirty days before the end of the 30-day probation, Ms. Leffel was once again called to meet with the same Bank superiors, Kearns, Peffley and Andrysiak. The date was April 8, 1993. [R. 67, pp. 12]. At this meeting, more unwarranted claims surfaced. For example, Ms. Leffel was accused of bizarre behavior because she used the time clock to document the fact that she was at the bank at the required hours, attempting to directly answer the previous claims made against her at the first meeting. [R. 50, Ex. 7, pp. 207-208; Ex. 13, pp. 121-124]. She was also accused of being paranoid, [R. 67, pp. 13] ignoring the fact that Ms. Leffel's "monitor" had voiced the original allegations against her and had made statements to the effect that she wanted Ms. Leffel's manager position. [R. 50, Ex. 14; Teeter Dep., 3/22/95, pp. 4-8, 24; Leffel Dep., 3/21/95, pp. 212]. An additional charge was one of being anxious over her medical condition and that she feared the Bank would deny her LTD benefits. [R. 50, Ex. 8, pp. 94, 16, & 17; Dep. of Teeter, 3/22/95, pp. 44, 47, & 63]. Fearing that the Bank would use a non-symptomatic medical condition to force one out of a job, knowing that one could not qualify for LTD benefits, could be considered causative in producing an anxious reaction. The

Bank superiors repeatedly heaped unwarranted claims upon Ms. Leffel and then used her understandable response to these threats as evidence to support their original claims.

The inconsistencies and fabrications as evidenced by the various Bank superiors' deposition testimony are numerous. However, some merit special attention. First, Mr. Kearns claims one reason they fired Ms. Leffel was because some of her subordinates threatened to quit. He reviewed the personnel records and performance of those employees threatening to quit, but did not review Ms. Leffel's performance. [Jerome Kearns Deposition, December 7, 1994, pp. 130]. Knowing that Ms. Leffel had MS, Mr. Kearns offered Leffel medical disability, but stated that if the disability was refused, he would have fired her anyway. [Id. at pp. 132]. If Ms. Leffel was not fired, as Defendants claim, why did they never follow-up with Ms. Leffel when they neither received any LTD information nor had heard from Ms. Leffel? Mr. Kearns testified that he had offered Ms. Leffel 90 days of full pay after she left the Bank, and then LTD after that period. Neither offer ever materialized (Id. at pp. 23).

Although Mr. Kearns, Ms. Peffley, and Ms. Andrysiak, in their affidavits, deny ever terminating Ms. Leffel [R. 46, Ex. A, B, C], the actions of that day indicated otherwise. In fact, Defendants finally contend that Ms. Leffel was indeed fired [R. 47].

Upon returning to her branch after the meeting of April 8, Ms. Leffel observed Ms. Teeter giving Ms. Peffley the form she was required to fill out observing Ms. Leffel's behavior, suggesting that the individuals who

fired Ms. Leffel did not actually have Ms. Teeter's observations prior to Ms. Leffel's termination. [Leffel Dep., 3/21/95, pp. 232-233].

At no time during the meetings nor during the probation period were any alternatives offered to accommodate Ms. Leffel's perceived disability, nor was she given any counseling for her alleged deterioration in work performance. The Bank superiors did not even give Ms. Leffel the benefit of the entire 30 day probation period promised her before they terminated her. [R. 50, pp. 10-11]. Ms. Leffel contends that this supports her claim that these demands were illusory and pretextual. A few weeks later, Ms. Leffel, through her attorney, requested an accommodation (right to continue working in her position), and a copy of her personnel file. Both requests were denied. [R. 50, Ex. 7, pp. 248-249, Ex. 18-19].

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

A. The Seventh Circuit Court of Appeal's Erred in its Restrictive Interpretation and Application of the Burden Shifting Requirements Regarding the Showing of Pretext as Espoused in *Hicks*.

When Congress adopted the Americans With Disabilities Act, it clearly intended broad coverage by including adverse actions taken because of "perceptions" of disabilities among behavior prohibited by the Act. 42 USC §§ 12101(b), 12102, 12112; 29 CFR pt. 1630 app. § 1630.2(1); *S. Rep. No. 116*, 101st Cong., 1st Sess. 21 & 23 (1989). Equally clear is that Congress understood the ease with which employers could fabricate "evidence" against

a disabled employee in order to force them out, to reduce insurance costs, to alleviate an "uncomfortable" situation, or to satisfy their own prejudice. *School Board of Nassau County v. Arline*, 480 U.S. 273 & 284, 42 EPC ¶ 36, 791, 1 AD Cas. (BNA) 1026 & 1030 (1987); *See also H.R. Rep. No. 485 pt.2*, 101st Cong., 2d Sess. 50, 30 (1990). The Act forces an employee to show at least an inference of discrimination, whether or not the employer has "evidence" to the contrary. *DeLuca v. Winer Industries, Inc.*, 53 F.3d 793, 797 (7th Cir., 1995); *O'Connor v. Consolidated Coin Caterers Corp.*, 116 S.Ct. 1307, 1310 (1996); *Sanchez v. Lagoudakis*, 440 Mich. 496 (1992).The decision in *St. Mary Honor Center v. Hicks*, 509 U.S. 502, 113 S.Ct. 2742 (1993)(hereinafter "*Hicks*"), and its application by the lower courts drastically depart from Congressional intent by severely restricting the scope under which a person can show discrimination. A case decision is properly overruled where "development of Constitutional law since the case was decided has implicitly or explicitly left [it] behind as a mere survivor of obsolete Constitutional thinking." *Agostini, et al. v. Felton, et al.*, 117 S.Ct. 1332, 137 L.Ed.2d 492 (1997), *quoting* with approval from *Planned Parenthood of Southeastern PA v. Casey*, 505 U.S. 833, 857, 120 L.Ed.2d 674, 112 S.Ct. 2791 (1992).

Hicks and its recent progeny have removed the teeth of the Act, leaving the law naked before the barely hidden fabrications and innuendo of corporate America, who now use the ADA as a tool with which to bludgeon those who it was supposed to support; a "manifest injustice" to every disabled person.

In this era of misinterpreting the ADA, justice has indeed become blind to the changes that have taken place

in the everyday world of corporate America. By allowing the employer to have to produce a mere shred of "evidence" supporting whatever label they have given to their own discrimination, the Supreme Court has caused a fundamental inequity in their law.

In the employer/employee relationship, the advantages lie with the employer. These advantages include access to information; ability to create documentation; ability to review performance; to make, amend, or remove rules; and most importantly, to command. The employee has none of these abilities. The employee now, must somehow equalize this disparity and then prove his/her case. In these types of cases, the scales are inherently tilted toward the employer and justice should not and cannot be blind to this fact. Discrimination in today's workplace is much more sophisticated and rarely do employer's declare their discriminatory intent providing plaintiffs with the proverbial "smoking gun."

Simply, the employer has the means at its disposal to produce "evidence", the employee does not. The employer can review its employee at its discretion, the employee cannot review its employer. The only way he can do so is through the legal system, which now has all but shut the door on his/her ability to do so. Before analyzing the truth of the employer's proffered reasons, the court must examine the nature of the evidence itself, before moving on to see if the employee can prove his/her case of intentional discrimination.

Neither of the hypothetical scenarios used in the majority's decision in *Hicks* are applicable to the facts of this case, and have in common none of the same facts as

Leffel. *Hicks*, 509 U.S. at 511-514. In the *Hicks* decision, Justice Scalia, describes the *U.S. Department of Community Affairs v. Burdine*, 450 U.S. 248, 67 L.Ed2d 207 (1981), decision as allowing a situation "in which the little fish swallows the big one" and interprets the case law to prevent such a thing. *Id.* at 517. The inherent disparity as noted by the court is exactly the problem. The "little fish" must somehow puff itself up to the size of the "big fish" and then prove its case. Congress explicitly acknowledged this disparity and created the ADA to equalize the playing field. Now the Supreme Court has approved this power gap between employer and employee and has fashioned law to entrench this disparity, ignoring reality and fact as it did so.

In its reinterpretation of *Community Affairs v. Burdine*, 450 U.S. 248, 255, 67 L.Ed2d 207, 101 S.Ct. 1089, n. 8 (1981), in the *Hicks* decision, the Court notes examples of "inconsistencies" in *Burdine* for its opinion that the procedure to proving discrimination as set forth in *Burdine* is "inadvertent to the extent that it describes disproof of the defendant's reasons (for discrimination) as totally independent, rather than an auxiliary means of proving unlawful intent". *Hicks*, 509 U.S. at 423. In reaching this conclusion, the Court picked and chose words and sentences, rather than the body as a whole which is the full test of the law. In this, the Court missed a fundamental truism – when all other possibilities are exhausted, the one that remains must be the truth. In discrimination law, this is especially true since it is the Defendant who proffers and defends those possibilities. If the Plaintiff can prove them wrong, then the only possible reason for the adverse action is the discrimination.

"There will seldom be 'eyewitness' testimony as to the employer's mental process." *Hicks,* 509 U.S. at 526. This is especially true where the Plaintiff is regarded as having a disability. In this context, an employer's perception is key. As noted by the *Hicks* dissent, "given the assumption people don't act in a totally arbitrary manner, without underlying reasons, especially in a business setting, we have explained that a prima facie case implies discrimination because we presume [the employer's] acts if otherwise unexplained are more likely than not based on the consideration of impermissible factors." *Hicks,* 509 U.S. at 527-528, *citing Furnco Construction Corp. v. Waters, et al.,* 438 U.S. 567, 577; 98 S.Ct. 2943 (1978); and *U.S. Department of Community Affairs v. Burdine,* 450 U.S. 248, 254, 101 S.Ct. 1089 (1981).

The *Hicks* majority also opines that "the employer is free to lie to its heart's content about whether the plaintiff ever applied for a job, about how long he worked, how much he made – indeed, about anything and everything *except* the reason for the adverse employment action." *Hicks,* 509 U.S. at 521 What is the basis for the majority's arbitrary line between when an employer can lie and when he cannot? If, as the Court goes on to say, that the plaintiff has the ability to lie about everything it presents in its case, why wouldn't the same be true of the defendants? If this is true, the majority has erred in allowing an employer special consideration when the "little fish" has allegedly taken it away after the law (ADA) finally gave it equal footing. The reality of these principles in application to cases demonstrates the futility of discrimination actions unless one has the elusive "direct" evidence.

The standards rooted in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L.Ed2d 668 (1973), and *Burdine* must be adapted for "perception" situations which deal almost exclusively with intent and beliefs. This must be done in the context of Congressional intent and drafting of the ADA. The legislative history to the ADA notes, "[t]he perception of the covered entity is a key element of this test." *Report from the Committee on the Judiciary*, Report 101-485, Part 3, May 15, 1990, p.30. Employer's perceptions go directly to state of mind, intent and motivation of the Defendant which is inappropriate for summary judgment. *DePriest v. Seaway Foodtown, Inc.*, 543 F.Supp. 1355 (1982); *Hayden v. First National Bank of Mount Pleasant*, 595 F.2d 994 (1979). The *Hicks* decision, without further clarification from the high court, makes "perceived disability" cases impossible to prove or to even establish a prima facia case. While *Hicks* did not proclaim that the language in the ADA "regarded as having a disability" was unconstitutional, the broad application of the *Hicks'* burden shifting requirement in perception cases will have that effect. The lower courts will be forced to apply the general principal set forth in *Hicks* concerning discrimination to an area of interpretation which demands examination of intent and motive, even to arrive at a definition of the term "disability" under the Act. The intent of Congress was clearly to protect against the perception, albeit wrongly, of a disability. The burden shifting requirements of *Hicks* when applied in this fashion to ADA cases will defeat the broad purpose of the Act.

Consequently, the person with a disability such as MS which may be entirely asymptomatic, will be

unprotected even though the Act was designed to protect that individual. It is the misperceptions of the employer that furthered the incorrect assumption that Ms. Leffel was exhibiting MS symptoms. She was denied protection under the Act because the misperceptions of her employer were allowed to be used under the *Hicks* burden shifting process and stated in a way that demands that all the misperceptions be disproved. This process compels the individual to disprove the intent and motive of the employer who is seizing upon perceived disability to formulate its termination procedure.

B. The Seventh Circuit Court of Appeals Erred in Concluding that the District Court Properly Applied the Standards Required for Summary Judgment Where the Undisputed Facts, Inconsistencies in Defendants' Testimony and Allowable Inferences Raise Factual Issues Which Should Have Been Submitted to the Jury.

In this case, the question to be examined must be whether the employer's acts arise from its perceptions of Ms. Leffel's MS – or are the employers's actions motivated or derived from some other non-disability related criteria? Here, the employer cannot remove its perceptions of Ms. Leffel's medical condition it perceives from the mix. From the onset of the alleged "discovery" of the problem, which it must not be forgotten, came closely on the heels of the disclosure of Ms. Leffel's MS, the employer notes its perceptions that performance issues exist because of Petitioner's perceived disability. [*See* Petition for Rehearing En Banc, pp. 4; *Leffel v. Valley Financial Services, et al.*, ___ F3d ___, File No.: 96-1077, pp.

12-13 (May 15, 1997); R. 50, Ex. 4 & 5]. That this is primary in the considerations was magnified by the employer's "solutions" which were basically no-win choices – to take a medical leave (for which she was not qualified) or be terminated. Despite the documentation of its perceptions, the Seventh Circuit summarily concludes that this circumstantial evidence is simply not enough for Ms. Leffel to meet her burden of proof. [*Supra at* pp. 13].

Under *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089 (1981), Ms. Leffel may succeed in meeting her ultimate burden of proof by *indirectly* showing that the employer's proffered explanation is unworthy of credence. Ms. Leffel can establish this through circumstantial evidence. Although Ms. Leffel has already succeeded in showing that the employer's proffered reasons for her termination were unworthy of belief, the lower court completely failed to view the circumstances of these complaints and instead under the guidance of *Hicks* focused on the alleged performance in a vacuum. Years of competent and reliable service, promotions and significant responsibility are reduced to a window of three months arising from comments of three employees and without consulting at least one long term employee who had worked under Plaintiff's supervision also. [R. 69, Plaintiff's Motion for Reconsideration, Ex.1]. In fact the lower court had significant circumstances before it which offer substantial circumstantial evidence of the improper motives of the Employer's actions:

1. Initially the employer said that Ms. Leffel was not terminated, but it refused to honor her request for an accommodation. As late as June 1993, the employer took the position she had not been terminated. [R. 80] Then,

later, the employer took the position that Ms. Leffel was terminated but that it was for performance reasons, unrelated to their perceptions of her illness. [Appellees' Brief on Appeal, March 22, 1996, pp. 14].

2. The complete lack of credibility in the employer's position is further supported by the employer's position that Ms. Leffel announce to every member of her staff that she suffered from Multiple Sclerosis. [R. 50, Ex.7 & Ex.9].

3. During the course of her thirteen year tenure Ms. Leffel did not have a single disciplinary action taken against her, nor was she ever offered any counseling for her alleged deterioration in work performance. [R. 50, Ex. 4 & 5].

4. From early 1992 until fall of 1992, Ms. Leffel managed two bank branches. [R. 50, Ex. 7, pp. 335-336, Ex. 8, pp. 32].

5. In December 1992, Ms. Leffel received a glowing review with concerns only voiced about her timeliness. [R. 50, Ex. 5].

6. In December 1992 the employer and some employees learned that Ms. Leffel suffered from MS. [R. 50, Ex. 7, pp. 265-269, Ex. 9, pp. 52].

7. Less than three months after the disclosure of MS, Ms. Leffel was characterized as "over medicated" by three employees with questionable motives. [R. 50, Ex. 9, pp. 39-46, Ex. 12, pp. 100].

8. One long term employee whom Ms. Leffel supervised stated that Ms. Leffel was qualified and had maintained her level of performance. [R. 69, Plaintiff's Motion for Reconsideration, Ex. 1].

9. Long time customers reported that Ms. Leffel was treating them exceptionally well. [R. 69, Ex. 2].

10. Ms. Leffel was confronted with accusations without the opportunity to review the concerns in detail. [Peffley Dep., 3/20/94, pp. 69].

11. Ms. Leffel was threatened with termination and then given three options: (a.) Ms. Leffel should request an unpaid personal leave of absence; (b.) request a paid medical leave of absence; (c.) or resign. [R. 47].

12. Although Ms. Leffel did not request Long-term Disability, she was given an LTD form that she was required to fill out. [R. 50, Ex.13, pp. 25; R. 67, pp. 11-12].

13. If Ms. Leffel did not acquiesce to the Long-term Disability, the employer had already decided to terminate her. [R. 50, Ex.13, pp. 68 & 132].

14. Ms. Leffel was not offered any sort of accommodation for her perceived disability which was by that time widely assumed and acted upon by the employer. [R. 50, pp. 10-11].

15. The employer did not give Ms. Leffel the benefit of the entire 30-day probation before they terminated her. [R. 50, Ex. 4]

16. Ms. Leffel was characterized as exhibiting bizarre behavior because she was documenting her presence at work by use of a time clock after being accused of

not being present at work. [R. 50, Ex. 7, pp. 207-208, Ex. 13, pp. 121-124].

17. The employer stated that its perceptions of her disability had nothing to do with its actions, but its only alternatives to termination were medically related. [R. 50, Ex. 13, pp. 25].

18. The employer assigned as Ms. Leffel's monitor one of the complaining employees who had already expressed her perceptions of the effects of Ms. Leffel's illness. [Leffel Dep., 3/22/95, pp. 335-336; Peffley Dep., 12/20/94, pp. 32].

19. The March 9, 1993 meeting where three of Ms. Leffel's staff to discuss their medical concerns regarding Ms. Leffel escalated into a hunt for a basis for probation and termination completely within a sixty day period. [R. 50].

20. At the March 9, 1993 meeting the employer's agent notes that (a) Plaintiff is believed to be "over medicated", (b) "medical leave could cause financial burden" and (c) "2 options – take 30 days off with pay or medical leave or terminate." [Peffley Dep., 3/20/94, pp. 107-122].

21. Another branch manager, who suffered substantially more serious complaints was merely transferred to another branch rather than terminated for her poor performance. [R. 80, pp. 3]

22. Prior to the involuntary disclosure of her MS, Ms. Leffel's work performance was consistently rated average to above average. [R. 50. Ex. 4 & 5]

Every claim of an alleged problem is rooted in the employer's exaggerated notion of her medical condition

as it perceived them to be. This is evidenced by the reprimand for "unprofessional attire" when Plaintiff wore tennis shoes after an ankle injury (with permission) and by the employer's imagined perceptions (MS related symptoms) that Plaintiff was limping or foot dragging on another occasion. [R. 50, Ex. 7 & Ex. 13]

The Seventh Circuit errs in failing to account for years of above average evaluations when it states, "evaluations do not speak to conduct in early 1993 when complaints surface". Its outright dismissal of the previous December 1992 evaluation is astonishing which the court described as "not unqualified" because the employer did note that it was concerned about timeliness issues in December. However, it fails to note that in that same evaluation, Plaintiff scored a 4 (the highest possible rating) for staff cooperation.

With these circumstances and chain of events, the onerous burden placed upon Plaintiff by the Seventh Circuit's application of *Hicks* is clear. The employer has not said the words directly, but coming much closer to a smoking gun in the circumstances of proving a "perceptions" case is difficult to imagine.

In its application of the standards in this case, the Seventh Circuit has brought to life the concerns voiced in the Hicks dissent:

> [T]he Court repeats the truism that the Plaintiff has the – ultimate burden – of proving discrimination without ever facing the practical question of how the Plaintiff without such direct evidence can meet this burden . . . [T]he possibility of some practical procedure for addressing what

> *Burdine* calls indirect proof is crucial to the success of most Title VII claims for the simple reason that employers who discriminate are not likely to announce their discriminatory motive.

Hicks 509 U.S. at 534.

The Seventh Circuit's obligation was to take care not to resolve any genuine disputes as to the employer's intent and credibility. However when it determines that the Employer's "perceptions" are such that Plaintiff fails to meet her burden of production, it does just that. In rendering this opinion, the Court has determined the employer's perceptions to be only that the Plaintiff was not performing her job.

It is clear that the company perceived Ms. Leffel's MS as a problem and they forced her out because of it. The bottom line is that nothing else really makes any sense – when all else is gone, the discriminatory motive is all that is left to explain the employer's actions.

CONCLUSION

The District Court and the Seventh Circuit are essentially setting forth a standard which would require Plaintiffs come up with the "smoking gun." It is very rare that plaintiffs are able to produce direct evidence and even rarer still for them to be eyewitnesses to the employer's mental processes. Many of the ADA cases are "built on circumstantial evidence, and often they [plaintiffs] have little proof besides the prima facie case and the fact that the employer's stated reason for the discharge doesn't

make sense." *Judge Overrules Jury in Deciding Discrimination, Lawyers Weekly USA*, Issue 96-5, pp. 1 & 14 (February 26, 1996). The standard set forth in *Hicks*, at least as applied by the Seventh Circuit is contrary to Congress' purpose in establishing the Americans with Disabilities Act.

RELIEF REQUESTED

Petitioner respectfully requests that this Court grant her request for certiorari and REVERSE the ruling of the Seventh Circuit Court of Appeals in this matter. Petitioner respectfully requests that this Court REMAND this case to the U.S. District Court for trial on the merits.

Respectfully Submitted,

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Dated: September 12, 1997

INDEX TO THE APPENDIX

May 15, 1997	Opinion from the 7th Cir. Court of Appeals Affirming Lower Court's Summary Judgment	1a
May 15, 1997	7th Cir. Court of Appeals Judgment with Oral Argument – District Court Judgment Affirmed	20a
July 10, 1997	7th Cir. Order Denying Appellant's Motion for Stay of Mandate Pending Petition for Certiorari	21a
June 16, 1997	7th Cir. Order Denying Appellant's Motion for Rehearing En Banc	22a
December 13, 1995	US District Court – Northern District of Indiana, Memorandum & Order Denying Plaintiff's Motion for Reconsideration	24a
August 24, 1995	Judgment in Favor of Defendants and Against Plaintiff (US District Court)	33a
August 24, 1995	Memorandum and Order Granting Defendants' Motion for Summary Judgment (US District Court)	34a
42 USC § 12101	The American With Disabilities Act of 1990, As Amended	59a

In the
United States Court of Appeals
for the Seventh Circuit

No. 96-1077

JO ANN LEFFEL,

Plaintiff-Appellant,

v.

VALLEY FINANCIAL SERVICES and VALLEY AMERICAN BANK AND TRUST COMPANY,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Indiana, South Bend Division.
No. 94 C 459 – Robert L. Miller, Jr., *Judge.*

ARGUED MAY 16, 1996 – DECIDED MAY 15, 1997

Before POSNER, *Chief Judge,* and ESCHBACH and ROVNER, *Circuit Judges.*

ROVNER, *Circuit Judge.* Jo Ann Leffel lost her job as a branch manager with Valley American Bank in 1993. She filed this suit contending that she was discharged in violation of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, because she suffers from multiple sclerosis. The district court granted summary judgment in favor of the defendants, finding that Leffel had not produced evidence that she was meeting her employer's legitimate expectations or that her medical condition had influenced the decision to discharge her. We affirm.

I.

Leffel began work for Valley American Bank in 1980. Beginning in 1988, she served as the manager of the downtown Mishawaka, Indiana branch of that Bank.[1] She earned average to above average marks on her annual reviews, and not until 1993, shortly before her discharge, was she ever subject to a reprimand or formal discipline by the Bank. In her December 1992 performance review, Leffel was given an overall performance rating of 2+, with a 2 indicating that the employee's work "meets, or in some aspects exceeds [the] requirements of the position" and a 3 indicating that her work "frequently exceeds [the] job requirements in several aspects; [that the employee performs] better than satisfactory employees with similar responsibilities; [that she] attains good accomplishments and end results[; and that] [m]inimum direction [is] required." Leffel received ratings of 2, 3, or 4 ("consistently performs well above most employees on a comparable level") with respect to all performance attributes except for timeliness. In that category she was rated a 1, indicating that her performance was "barely adequate," required monitoring, and would be cause for dismissal in the absence of improvement.

In March of 1993, Sheila Ann Swinehart, a part-time teller at the downtown branch, contacted Margaret

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[1] Leffel asserts that at one time (in approximately February 1992), she was responsible not only for the downtown Mishawaka branch of the Bank, but two others as well. As best we can determine from the record, however, at the time of her discharge she was responsible solely for the downtown branch.

Andrysiak, Director of Human Resources for the Bank, to express concern about Leffel. Among other things, Swinehart told Andrysiak that there was a lack of communication between Leffel and her staff and that Leffel appeared to be "overly medicated." That phone call led to a breakfast meeting with Leffel's staff (to which she was not invited) and a decision by Bank management to place Leffel on probation.

On March 15, 1993, Leffel was called to a meeting with Bank vice-president Jerome Kearns, Debra Peffley (Bank Center Administrator and Leffel's supervisor), and Andrysiak. Kearns read to Leffel a list of ten perceived problems with Leffel's performance, including excessive absenteeism, failure to submit reports on a timely basis, failure to return phone calls from other departments, failure to communicate information to her staff, and a reluctance to attend compulsory meetings. R. 47 Ex. K. Kearns then reviewed with Leffel a second list of twelve items that specified what was expected of Leffel in the way of improvement in these and the other problem areas discussed. *Id.* Ex. M. Leffel was ultimately called upon to sign a third document acknowledging that she was being placed on probationary status effective the following day and would be terminated if she failed to meet the level of performance expected of her. *Id.* Ex. L. That document also listed "other options" of which Leffel might avail herself, including an unpaid leave of absence, paid medical leave, or resignation. *Ibid.*

During that meeting, Leffel disclosed that she suffered from multiple sclerosis, a degenerative disease of the central nervous system. Leffel had been diagnosed with the disease in 1979, but prior to this time it had not

affected her work and with two exceptions she had not revealed the diagnosis to her co-workers. She had, however, disclosed her condition on a medical form when the Bank had altered its insurance plan the previous December, and Leffel suggests that Andrysiak may have been made aware of it in after a representative of the Bank's insurer disclosed it to one of Andrysiak's subordinates. Leffel also had the impression that everyone present at the March 15 meeting was already aware that she had MS, although Kearns and Peffley later indicated that this was the first they had heard of it. Andrysiak apparently had already been informed of Leffel's MS, as Leffel suggests, although Andrysiak claimed to have forgotten until "reminded" of it at this meeting. She maintained she had never passed that information along to Kearns and Peffley. In any event, according to Leffel, she was directed over her own objection to disclose her MS to her staff. She did so the following day.

At that same meeting, Leffel was also given paperwork for her physician to sign in the event she elected to seek long-term disability leave. Leffel later gave the papers to her doctor, who refused to sign them, believing that Leffel retained the ability to work. Leffel herself maintains that she remained fully able to work and needed no accommodation to remain in her job.

On April 8, 1993, Kearns, Peffley, and Andrysiak met once again with Leffel to discuss her performance during the probationary period. At that meeting, Leffel was given and asked to sign a report discussing her conduct relative to the list of performance expectations she had been given at the March 15 meeting. R. 50 Ex. 22. In some areas (absences, for example), no shortcomings were

noted. Problems were noted in other areas, however. For example, Leffel was still not returning business-related telephone calls in a timely fashion. Moreover, in certain respects, Leffel had conducted herself in a fashion that the Bank deemed paranoid. Leffel appeared unwilling to deal with her assistant, Carolyn Teeter, whom the Bank had made responsible for monitoring Leffel's performance. Moreover, apparently in response to the concerns raised about her timely reporting for work, Leffel had also begun to log her arrival and departure using the safe deposit time clock, which the Bank regarded as distracting and unacceptable. The report summary stated:

> Problems still continue at D.T. Mishawaka under Joann's [sic] leadership. She is resentful if the support staff goes to Carolyn. Joann herself complains about Carolyn to support staff which must stop immediately. Joann is paranoid about every phone call, each conversation with a fellow employee and tries to talk Carolyn into accepting another job. Joann does not feel she is acting strangely or doing anything wrong; and, feels that the Bank does not want her to go on long-term disability. A routine call from a sick employee upsets Joann if she learns that the information has been passed on to Branch Administration. The situation at the branch has become strained and this situation has to be alleviated.

Id. at 2. The report concluded with a recommendation that Leffel either obtain long-term disability leave or be removed from her duties as the manager of the downtown Mishawaka branch. Although Kearns, Peffley, and Andrysiak deny terminating Leffel at this meeting, she contends that they did. According to Leffel, her keys to

the branch were taken from her, she was told to make an appointment with Peffley if she wanted to remove her personal belongings, the closing of her account with the Bank was discussed, and she was issued a final paycheck for the four weeks of unused vacation time she had accrued. April 8 was the last day that Leffel worked for the Bank.

Leffel eventually filed suit against the Bank and its holding company, Valley Financial Services, contending that she had been discharged in violation of the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.* At the conclusion of discovery, the defendants moved for summary judgement, arguing that the Bank had placed Leffel on probation and then discharged her[2] not on the basis of her asserted disability,[3] but because she was failing to meet the Bank's legitimate performance expectations. Upon review of the record, the district court found that Leffel had not established a genuine dispute of fact in this regard. The court considered first the decision to place Leffel on probation. Although Leffel's performance evaluations for 1990 through 1992 had all been satisfactory, the court pointed out that those evaluations did not speak to her conduct in early 1993, when the complaints about her behavior surfaced. Memorandum and Order at 19. Leffel had done little to rebut these criticisms directly, the

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[2] The defendants conceded, for purposes of the motion for summary judgment, that the Bank had, in fact, discharged Leffel.

[3] The court had some doubt as to whether Leffel had presented sufficient evidence that she qualified as a disabled individual, but it did not dispose of the case on that basis.

court found, beyond making conclusory assertions that they were meritless and that her performance was satisfactory. In certain instances, she attempted to offer explanations for the circumstances giving rise to the complaints about her work, but these explanations did not tend to show that her performance was, in fact, adequate. *Id.* at 19-20. At the same time, Leffel had offered no evidence from which a reasonable factfinder might conclude that the Bank's stated reasons for placing her on probation were not credible or that the Bank actually was motivated by her disability. *Id.* at 20-21. As to Leffel's termination, the court again found that with one exception, Leffel had failed to address the bulk of the concerns raised at the follow-up meeting on her last day of work. *Id.* at 22-23. Likewise, she had again pointed to no evidence suggesting that the Bank had terminated her because of her disability rather than the perceived problems with her work. *Id.* at 23-24.

> Although Ms. Leffel asserts her own reasons as to why the Bank wanted to get rid of her, the facts that she presents amount to no more than speculation; they cannot give rise to the inference of intentional discrimination. At most, these facts support the proposition that she was terminated despite her condition, and not because of it. Ms. Leffel clearly wishes she had been give[n] more of a chance to explain herself, but her evidence would not allow a jury to find that her performance was adequate or that the Bank's stated reason was merely a pretext for intentional discrimination. The Bank is entitled to summary judgment.

Id. at 24 (citation omitted).

Leffel subsequently moved for reconsideration, tendering the affidavits of Arlene Sorenson, a teller who had worked under Leffel's supervision, and Mary Watterud, a Bank customer. R. 70 Ex. 1; R. 71 Attachment. Both individuals spoke in glowing terms of Leffel's service and capabilities. Although the district court indulged the assumption that these affidavits were, as Leffel contended, unavailable to her previously, it found them insufficient to establish a question of fact as to whether Leffel was performing to the Bank's satisfaction. Sorenson's affidavit, although highly favorable in its assessment of Leffel, did not speak specifically to the reasons that the Bank had articulated for placing her on probation and then removing her from her post; nor did it otherwise suggest that these reasons were a pretext for discrimination. Reconsideration Memorandum and Order at 5-6. Likewise, even if Watterud's affidavit, along with the complimentary affidavits of two other customers Leffel had submitted previously, tended to establish across-the-board customer satisfaction with her work, they did not address the specific criticisms that Bank management had voiced. *Id.* at 6-7. The court therefore denied Leffel's motion to reconsider.

II.

We review the district court's summary judgment ruling de novo, considering the evidence and the inferences that one might reasonably draw from it in a light that most favors Leffel. *Greenslade v. Chicago Sun-Times, Inc.*, No. 96-2705, slip op. at 2 (7th Cir. Apr. 29, 1997); *Giannopoulos v. Brach & Brock Confections, Inc.*, 109 F.3d

406, 410 (7th Cir. 1997). As this is an employment discrimination case, we also take care not to resolve any genuine disputes that have been properly established as to the employer's intent and credibility. *See id.* The court's decision to deny Leffel's motion for reconsideration is one we review for abuse of discretion only. *Edward Gray Corp. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 94 F.3d 363, 367 (7th Cir. 1996).

The ADA prohibits an employer from discriminating against "a qualified individual with a disability because of the disability of such individual. . . . " 42 U.S.C. § 12112. "Disability" is defined as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such an impairment." *Id.* § 12102(2). Leffel's position is not that she has any physical or mental impairment, or any record of such impairment, as the result of MS, but that she was regarded as having such an impairment by other Bank employees and officials. Although the Bank disputes that point, we shall assume, as the district court did, that Leffel indeed was regarded as having a physical or mental impairment and thus is entitled to claim the protection of the ADA. We shall also assume, although this point too is disputed, that the Bank ultimately did discharge Leffel at the follow-up meeting on April 8. The focus of the district court's ruling, and the principal question that the parties address in this appeal, is whether Leffel has come forward with enough evidence to suggest that she was placed on probation and then discharged because of her perceived disability to avoid summary judgment.

As in any other type of employment discrimination case, a plaintiff may establish that she was discharged in violation of the ADA by direct or indirect means. *DeLuca v. Winer Indus., Inc.*, 53 F.3d 793, 797 (7th Cir. 1995). Leffel points us to no direct proof that she was disciplined and then discharged because she has MS, and instead points to circumstantial evidence that she believes gives rise to that inference. The district court examined this evidence within the burden-shifting framework that the Supreme Court first articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973). *See also Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089 (1981); St. *Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742 (1993). Although this analysis derives from Title VII cases, we saw no reason in *DeLuca* not to apply it to ADA claims (53 F.3d at 797); and our sister circuits have likewise found the analysis appropriate to this context. *See Lawrence v. National Westminster Bank New Jersey*, 98 F.3d 61, 68 & n. 7 (3d Cir. 1996) (collecting cases). Within the *McDonnell Douglas* framework, it falls to the plaintiff to first establish a prima facie case of discrimination. If she succeeds in doing so, the defendant must then articulate a legitimate, non-discriminatory reason for discharging her. At that juncture, the plaintiff must then establish that this proffered reason is really a pretext for discrimination. *DeLuca*, 53 F.3d at 797.[4]

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[4] This is not a case in which the plaintiff has charged her employer with a failure to make a reasonable accommodation to her disability. The *McDonnell Douglas* burden-shifting framework typically is not applicable in that context. *See Bultemeyer v. Fort Wayne Community Schools*, 100 F.3d 1281, 1283 (7th Cir.1996).

A cautionary word is in order as to what kind of evidence the plaintiff must produce in order to establish a prima facie case. "[T]he prima facie case requires 'evidence adequate to create an inference that an employment decision was based on a[n] [illegal] discriminatory criterion. . . . ' " *O'Connor v. Consolidated Coin Caterers Corp.*, 116 S. Ct. 1307, 1310 (1996) (quoting *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 358, 97 S. Ct. 1843, 1866 (1977) (emphasis found in *O'Connor* removed)); *see also Burdine*, 450 U.S. at 253-54, 101 S. Ct. at 1094. Since the Supreme Court first articulated the components of the prima facie case in *McDonnell Douglas* (*see* 411 U.S. at 802, 93 S. Ct. at 1824), district courts and courts of appeals alike have often suggested that as part of her prima facie case, a plaintiff complaining of discrimination typically must show that she was rejected in favor of or replaced by someone of a different race or sex, for example, or in a case like this one, by someone who is not disabled. *See, e.g., Hill v. Burrell Communications Group, Inc.*, 67 F.3d 665, 668 (7th Cir. 1995); *Sample v. Aldi Inc.*, 61 F.3d 544, 548 (7th Cir. 1995). The Supreme Court's opinion in *O'Connor* makes clear, however, that such proof is not inevitably necessary. 116 S. Ct. at 1310. There the Court rejected the notion that a person contending that he was discharged in violation the Age Discrimination in Employment Act ("ADEA") must show that he was replaced by someone outside the group of persons protected by the statute (in other words, someone under the age of 40) in order to make out a prima facie case of age discrimination:

> As the very name "prima facie case" suggests, there must be at least a logical connection

> between each element of the prima facie case and the illegal discrimination for which it establishes a "legally mandatory, rebuttable presumption," *Burdine, supra,* at 254, n. 7, 101 S. Ct., at 1094, n. 7. The element of replacement by someone under 40 fails this requirement. The discrimination prohibited by the ADEA is discrimination "because of [an] individual's age," 29 U.S.C. § 623(a)(1), though the prohibition is "limited to individuals who are at least 40 years of age," § 631(a). This languages does not ban discrimination against employees because they are aged 40 or older; it bans discrimination against employees because of their age, but limits the protected class to those who are 40 or older. The fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant, so long as he has lost out *because of his age*. Or to put the point more concretely, there can be no greater inference of *age* discrimination (as opposed to "40 or over" discrimination) when a 40 year-old is replaced by a 39 year-old than when a 56 year-old is replaced by a 40 year-old. Because it lacks probative value, the fact that an ADEA plaintiff was replaced by someone outside the protected class is not a proper element of the *McDonnell Douglas* prima facie case.

116 S. Ct. at 1310 (emphasis in original). Following *O'Connor's* lead, we have disavowed prior cases from this circuit suggesting that a Title VII plaintiff must show that she was replaced by someone of a different race, sex, and so on. *Carson v. Bethlehem Steel Corp.*, 82 F.3d 157, 159 (7th Cir. 1996) (per curiam). We emphasized that although that kind of proof "may help to raise an inference of discrimination," it is not required to make out a prima facie case,

so long as there is some evidence from which one can infer that the employer took adverse action against the plaintiff on the basis of a statutorily proscribed criterion. *Id.*; *see also Wallace v. SMC Pneumatics, Inc.*, 103 F.3d 1394, 1397-98 (7th Cir. 1997).

We take the opportunity to reiterate here what we believe to be the central point of both the Supreme Court's opinion in *O'Connor* and our own opinion in *Carson*: that the nature of the proof giving rise to the requisite inference of discrimination cannot be reduced to a formula that will serve any and all discrimination cases. We noted in *DeLuca*, for example, that in the context of a reduction-in-force suit, the plaintiff would have to establish as the final element of his prima facie case that employees not in the class of persons protected by the ADA were treated more favorably than he. 53 F.3d at 797 (citing *Oxman v. WLS-TV*, 846 F.2d 448, 455 (7th Cir. 1988)). We also took care to note, however, that "[t]he *McDonnell-Douglas* test was never meant to be applied rigidly," and that the elements of the prima facie case as we had described them might change as the case law applying the ADA evolved. *Id.* n. 4. *DeLuca's* framing of that final element of the prima facie case-proof that persons not disabled or perceived to be disabled were treated more favorably than the plaintiff – actually tracks comparable language found in a host of other discrimination cases. *See, e.g., Wallace*, 103 F.3d at 1398 (national origin discrimination); *Denisi v. Dominick's Finer Foods, Inc.*, 99 F.3d 860, 864 (7th Cir. 1996) (age discrimination); *Geier v. Medtronic, Inc.*, 99 F.3d 238, 241 (7th Cir. 1996) (sex discrimination-pregnancy); *Cheek v. Peabody Coal Co.*, 97

F.3d 200, 203-04 (7th Cir. 1996) (sex discrimination). Evidence of disparate treatment is certainly one of the most obvious ways to raise an inference of discrimination absent direct proof of discriminatory animus. It should not be understood as the only means of doing so, however. A branch manager like Leffel, for example, occupies a position of significantly greater responsibility and discretion than that of most other bank employees. When cited for purported shortcomings in her performance, she may find it difficult to find evidence of disparate treatment in criticisms that are intertwined with the unique aspects of her position. But there may be other circumstances that bespeak discrimination. A bank officer who is praised and given wide discretion in the performance of her duties one day but is confronted with a laundry list of manufactured criticisms and confining performance standards the next may be able to raise an inference that discrimination is afoot by establishing that the only intervening event was the disclosure that she is disabled. All that is necessary is that there be evidence reasonably suggesting that the employer would not have taken adverse action against the plaintiff had she not been disabled and everything else had remained the same. *See Carson*, 82 F.3d at 158. "Any demonstration strong enough to support a judgment in the plaintiff's favor if the employer remains silent will do, even if the proof does not fit into a set of pigeonholes." *Id.* at 159. With all that in mind, Leffel would have to show the following in order to satisfy her initial burden under the *McDonnell Douglas* framework: (1) that she is disabled within the meaning of the ADA, (2) that her work performance met her employer's legitimate expectations, (3) that she was

discharged, and (4) that the circumstances surrounding her probation and discharge indicate that it is more likely than not that her disability was the reason for these adverse actions. *See Ennis v. National Ass'n of Bus. & Educ. Radio, Inc.*, 53 F.3d 55, 58 (4th Cir. 1995).

Our focus here is on the second of these elements – whether Leffel was meeting the Bank's legitimate expectations. As Judge Miller pointed out, that question necessarily overlaps with the veracity of the performance-related reasons that the Bank cited for placing Leffel on probation and then dismissing her from her post. Memorandum and Order at 18 (citing *President v. Illinois Bell Tel. Co.*, 865 F. Supp. 1279, 1285 (N.D. Ill. 1994)). We agree with the district court that Leffel has not carried her burden on this aspect of the prima facie case.

Leffel has failed to address with any specificity the Bank's reasons for putting her on probation and then, when it deemed her subsequent performance insufficiently improved, asking her to leave. In the initial disciplinary meeting on March 15, the Bank identified some ten areas of concern. We mentioned some of them previously in our summary of the facts. In granting the Bank's motion for summary judgment, the district court noted that Leffel had for the most part failed to respond to these concerns with anything but vague and generalized assertions that she was a competent employee and that the Bank's criticisms were meritless. Memorandum and Order at 19-20. The same shortcomings characterize her appellate presentation. Leffel argues that she was "well qualified" to continue as branch manager and that "her performance was more than simply adequate but was in

fact exemplary." Leffel Br. 17. She points to the satisfactory performance statistics of the downtown Mishawaka branch as evidence that her conduct was in no way impeding the success of the Bank. But surely an employer does not have to wait until its bottom line is affected to discipline an employee whose work is found wanting. Leffel addresses only one or two of the concerns that the Bank cited in placing her on probation. She notes, for example, that although she was cited for wearing unprofessional attire – tennis shoes – the casual shoes were necessitated by an injury to her foot and in fact she had been given permission by her superiors to wear them. But the bulk of the deficiencies attributed to her are left unaddressed. Similarly, although Leffel criticizes the Bank's assessment of her subsequent performance during the probationary period, she does nothing to demonstrate that she had brought her performance to an acceptable level. Instead, she resorts to her previous performance reviews, which indicate that her performance met expectations in most areas. In so doing, she wholly ignores the district court's observation that the latest of these reviews took place in December 1992, and that it was several months later, in March 1993, when Bank management was made aware of the problems staff members at the downtown Mishawaka branch were observing with Leffel's conduct. The reviews themselves were not unqualified – problems were noted even then with Leffel's timeliness, for example, and that is a concern which crops up in the list of items discussed with Leffel at the March 15 meeting. So the satisfactory reviews Leffel received previously do not call into question the criticisms that culminated in her discharge.

In attempting to show that the Bank's criticisms of her work were pretextual, Leffel places much emphasis on what seems to her to be the suspicious sequence of the events preceding her discharge: shortly after she revealed to the Bank's health care insurer that she had MS, concern was expressed that she appeared "overly medicated," Andrysiak met with Leffel's staff without notice to Leffel herself, a laundry list of performance concerns was presented to her, it was suggested that she might want to consider seeking disability leave, and she was told to inform her staff that she had MS. Whether we may infer that Bank officials knew that Leffel had MS before she disclosed it during the initial disciplinary meeting is the subject of certain evidentiary arguments into which we need not delve. The sole question with which we are concerned is whether the Bank's complaints about Leffel's performance were genuine or whether they were merely a cover for a decision to force her out because the Bank perceived her to be disabled. Even if we assume that the Bank knew from the outset that Leffel had MS, there simply is no evidence from which one might reasonably infer that its decision to place her on probation and then to ask her to leave were based on her perceived disability rather than upon actual shortcomings in her work.[5] Beyond this, any shortcomings in the Bank's handling of the situation (its request that she disclose her MS

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[5] Leffel points to several other circumstances that purportedly reveal an aversion to employees with health problems and to people with MS in particular. She notes that when the Bank held a meeting to discuss a change in its health insurance coverage, there was an air of disgruntlement about the fact the Bank had been forced to make the change due to an increase in insurance rates, and that the increase was attributed

to her staff, for example) are not subject to redress within the confines of her complaint.

Other issues are raised in this appeal, including Valley Financial Services' liability for the discrimination, if any, committed by its wholly-owned subsidiary and the propriety of the district court's decision to deny the motion for reconsideration that Leffel filed after the adverse summary judgment ruling. The former issue we need not address, given our agreement that the entry of summary judgment against Leffel was proper. The motion for reconsideration was addressed to the district court's judgment, and we do not think the district court in any way abused its discretion. We have reviewed the affidavits that Leffel relied upon in seeking reconsideration, and we agree with the district court that although

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to employees with chronic health problems. She also notes that certain Bank employees had expressed discomfort with a customer in the advanced stages of MS. She points to a remark by Kearns that if something were not done about the perceived shortcomings in Leffel's performance, the Bank would lose employees. And finally, she notes that when her subordinates were told upon her departure that she had taken medical leave, one or more of them expressed the hope that if she returned to work, it would not be at the downtown Mishawaka branch. What Leffel reads into all of this is that the Bank wanted to rid itself of employees who, like her, had medical conditions that were expensive and made co-workers ill at ease, and so it invented a set of criticisms that would justify discharging her. Her perception may or may not be correct. What dooms her case, however, is her failure to confront the criticisms that the Bank has articulated. Beyond cursory reference to her prior reviews, Leffel makes virtually no effort to show that her performance met legitimate expectations and that the reasons given for her termination were in fact pretextual.

highly complimentary of Leffel, particularly with regard to her customer service skills, they do not call into question the Bank's stated reasons for disciplining Leffel.

III.

For the reasons discussed, we AFFIRM the grant of summary judgment in favor of the defendants as well as the denial of Leffel's motion to reconsider that ruling.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: May 15, 1997

BEFORE: Honorable Richard A. Posner, Chief Judge

Honorable Jesse E. Eschbach, Circuit Judge

Honorable Ilana Diamond Rovner, Circuit Judge

No. 96-1077

JO ANN LEFFEL,

Plaintiff-Appellant,

v.

VALLEY FINANCIAL SERVICES and VALLEY AMERICAN BANK AND TRUST COMPANY,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division
No. 94 C 459, Robert L. Miller, Judge

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

July 10, 1997

Before

HON. ILANA DIAMOND ROVNER, *Circuit Judge*

JO ANN LEFFEL, Plaintiff-Appellant, No. 96-1077 v. VALLEY FINANCIAL SERVICES AND VALLEY AMERICAN BANK AND TRUST COMPANY, Defendants-Appellees.	Appeal from the United States District Court for the Northern Court for the Northern District of Indiana, South Bend Division No. 94 C 459 Robert L. Miller Judge

Upon consideration of the **APPELLANT'S MOTION FOR STAY OF MANDATE PENDING PETITION FOR CERTIORARI,** filed on June 23, 1997, by counsel for the appellant,

IT IS **ORDERED** that the motion is **DENIED.**

United States Court of Appeals

FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

June 16, 1997.

Before

Honorable Richard A. Posner, Chief Judge

Honorable Jesse E. Eschbach, Circuit Judge

Honorable Ilana Diamond Rovner, Circuit Judge

No. 96-1077

JO ANN LEFFEL, Plaintiff-Appellant, v. VALLEY FINANCIAL SERVICES AND VALLEY AMERICAN BANK AND TRUST COMPANY, Defendants-Appellees.	]]]]]]]]]]]	Appeal from the United States District Court for the Northern Court for the Northern District of Indiana, South Bend Division No. 94 C 459 Robert L. Miller, Jr., Judge

ORDER

On consideration of the petition for rehearing with suggestion for rehearing en banc filed by appellant on May 29, 1997, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny the petition. Accordingly,

IT IS HEREBY ORDERED that the petition for rehearing with suggestion for rehearing en banc be, and the same is, hereby DENIED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

JO ANN LEFFEL, *Plaintiff,* vs. VALLEY FINANCIAL SERVICES, and VALLEY AMERICAN BANK, *Defendants.*	)	No. 3:94-CV-459RM

MEMORANDUM AND ORDER

This cause comes before the court on the plaintiff's motion for reconsideration and motion to supplement the reconsideration motion. For the reasons that follow, the court denies the motion for reconsideration, and grants the motion to supplement the motion for reconsideration.

The court presumes the reader's familiarity with the facts of this case and the August 24, 1995 order granting summary judgment in favor of the defendants. The plaintiff now seeks reconsideration of the August 24 order pursuant to Federal Rule of Civil Procedure 59(e). Reconsideration is warranted, according to Mrs. Leffel, based on the affidavits of Arlene Sorenson, who was a teller under the plaintiff's management while at Valley American Bank's Downtown Mishawaka Branch ("the Bank"), and Mary F. Wattrud, a Bank customer served by the plaintiff.

Mrs. Leffel's motion to reconsider asks that the court reconsider its summary judgment ruling in the defendants' favor. She claims that the affidavits of Mrs. Sorenson and Mrs. Watterud, when viewed in the context of the depositions of Jerome Kearns, Margaret Andrysiak, Debra Peffley, Sheila Swinehart, Carolyn Ann Teeter, Charles Day, and Virginia Marie Dreaves, show that the defendants' asserted reasons for Mrs. Leffel's probationary status and ultimate discharge are a pretext for discrimination in violation of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*

Mrs. Sorenson worked as a teller for the defendant Bank in the Downtown Mishawaka Branch for about 20 years. Mrs. Leffel was Mrs. Sorenson's supervisor from 1987 to April 1993. Mrs. Sorenson describes Mrs. Leffel as the best qualified and most intelligent of the 13 managers for whom she worked. Mrs. Sorenson personally observed Mrs. Leffel deal with both customers and other employees, and found her to be professional, fair, and accommodating of her employees needs. Mrs. Sorenson states that she did not see any negative changes in Mrs. Leffel's performance during the period when the defendants claim that her performance declined, and that she had nothing negative to report to employees who solicited criticisms regarding Mrs. Leffel after her separation from the Bank.

Mrs. Leffel also offers the affidavit of Mary F. Watterud, who was a Bank customer for 13 years, and whose accounts the plaintiff personally managed. Mrs. Watterud states that the service she received from the Bank, under Mrs. Leffel's management, was excellent, and that Mrs.

Leffel was both professional and personable. Mrs. Watterud also states that while she was in Florida, another Bank representative called her and told her that Mrs. Leffel had left the Bank.

A party may file a motion to alter or amend a judgment under Rule 59(e) of the Federal Rules of Civil Procedure. For the court to grant such a motion, here labeled a motion to reconsider, the motion must clearly demonstrate manifest error of law or fact or present newly discovered evidence that is material and could not have been discovered previously. *Figgie Int'l Inc. v. Miller*, 966 F.2d 1178, 1180 (7th Cir. 1991); *Publishers Resource, Inc. v. Walker-Davis Publications, Inc.*, 762 F.2d 557, 561 (7th Cir. 1985); *Amcast Indus. Corp. v. Detrex Corp.*, 822 F. Supp. 545 (N.D. Ind. 1992), *aff'd in part, rev'd in part on other grounds*, 2 F.3d 746 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 691 (1994); *Keene Corp. v. Int'l Fidelity Ins. Co.*, 561 F. Supp. 656, 665-66 (N.D. Ill. 1982), *aff'd*, 735 F.2d 1367 (7th Cir.), *and aff'd*, 736 F.2d 388 (7th Cir. 1984). A motion for reconsideration "cannot be used to raise arguments that could, and should, have been made before the judgment issued," *Federal Deposit Ins. Corp. v. Meyer*, 781 F.2d 1260, 1268 (7th Cir. 1986); *see also Figgie Int'l v. Miller*, 966 F.2d 1178, 1180 (7th Cir. 1992); *Holstein v. City of Chicago*, 149 F.R.D. 147, 148 (N.D. Ill. 1993); *aff'd*, 29 F.3d 1145 (1994), and "cannot be used to argue a case under a new legal theory." *Id.*

The defendants argue that the court should not consider the plaintiff's new affidavits because the plaintiff's motion did not explain why the affidavits had not been submitted in response to the summary judgment motion. The defendants argue that because Mrs. Sorenson and

Mrs. Watterud were identified in interrogatory answers as potential witnesses for the plaintiff, they were available, and their belated testimony should now be stricken. In her reply, Mrs. Leffel asserts that the affidavits previously were unavailable because both affiants are "retirees who have been traveling and sight seeing during the months prior to the trial date and were unavailable because they were out of town." Mrs. Leffel further states that she "diligently sought their testimony prior to the court's ruling but was unsuccessful in her attempts."

The party moving for reconsideration must establish that, through the exercise of due diligence, it could not have presented the "newly discovered evidence" during pendency of the earlier motion. *Rothwell Cotton Co. v. Rosenthal & Co.*, 827 F.2d 246, 251 (7th Cir.), *as amended, Rosenthal & Co., v. Rothwell Cotton Co.*, 835 F.2d 710 (7th Cir. 1987). The conclusory nature of Mrs. Leffel's statement that the new affiants' testimony was unavailable, despite her diligent attempts, would trouble the court if the outcome of the motion under Rule 59(e) depended on the court's willingness to consider the new affidavits. Because the newly presented evidence does not persuade the court that the order granting the defendants summary judgment in this case contains a manifest error of law or fact, however, the court grants the plaintiff's motion to supplement (allowing the filing of Mrs. Watterud's affidavit), and assumes, for purposes of this motion, that Mrs. Leffel established that the affidavits now submitted were previously unavailable.

The thrust of Mrs. Leffel's arguments in favor of reconsideration is that the court should consider the evidence contained in the new affidavits in the context of the

depositions of the key players involved in her placement on probation and eventual discharge. According to Mrs. Leffel, the new affiants' evidence shows that a material issue of fact exists as to the defendants' motives and intent. After consideration, however, the court concludes that Mrs. Leffel has not shown that the court committed a manifest error of law or fact in the granting of summary judgment against her.

Mrs. Leffel first argues that Mrs. Sorenson's affidavit, when read in conjunction with the depositions of those involved in the events leading to Mrs. Leffel's probation and termination, "clearly show[s] the pretextual nature of plaintiff's probation and termination process." Mrs. Sorenson's affidavit is highly complimentary of Mrs. Leffel, both professionally and personally, and touches upon Mrs. Leffel's relationships with both customers and other employees. However, the court's conclusion that the evidence could not support a finding that the Bank was either more likely motivated by a discriminatory reason or that the reasons given were not worthy of credence, *see* Memorandum and Order, August 24, 1995, at 20, 23; *Karazanos v. Navistar Int'l Trans. Corp.*, 948 F.2d 332 (7th Cir. 1991), is unchanged by the general, though glowing, statements of Mrs. Sorenson to the effect that Mrs. Leffel's customers were satisfied and that she was the best qualified and most intelligent manager. Mrs. Sorenson's personal experience with Mrs. Leffel and perspective on the events leading to her probation and eventual termination[1] are not, on their face, immaterial to the

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[1] The defendants conceded, for purposes of the summary judgment motion, that the plaintiff was discharged.

court's pretext analysis, but her statements simply do not speak to the reasons asserted by the defendants for why Mrs. Leffel was placed on probation and terminated; the defendants do not assert that Mrs. Leffel's termination was caused by customer dissatisfaction, or a lacking in qualifications or intelligence.[2]

Mrs. Leffel also relies upon Mrs. Sorenson's statement that after Mrs. Leffel's separation from the Bank, "several employees from our branch came to [her] and tried to solicit from [her] negative comments in regard to Jo Ann Leffel's performance." According to Mrs. Leffel, this statement "clearly supports plaintiff's claim that the criticisms directed towards her was [sic] pretextual and based on a perception which was fostered and pursued in support of the Bank's efforts to get rid of her." The court does not find the statement so persuasive. Mrs. Sorenson does not indicate who solicited the criticisms; the court cannot assume that it was those Mrs. Leffel believes were involved in causing her probation and termination, let alone the even narrower group that made the decisions concerning Mrs. Leffel's probation and termination. Without some basis to connect the statements to someone involved in this case, the statement that somebody was asking for criticisms of the plaintiff after her separation from the Bank does not meet the necessary threshold of relevance, and therefore could not provide support for Mrs. Leffel's claim of pretext.

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[2] The reasons proffered by the defendants for Mrs. Leffel's probationary status and termination are detailed in the court's August 24, 1995 Memorandum and Order, at 10-11, 13.

Mrs. Leffel also argues that because customer satisfaction had not deteriorated, Mrs. Leffel's performance was not a problem. She directs the court to Mrs. Sorenson's statement that customer reactions to Mrs. Leffel were very positive, and that customers would ask for her to serve them personally, and, the court assumes, to the additional affidavit of Mrs. Watterud, who states that Mrs. Leffel was personable, professional, efficient, and client-service oriented. This argument is unpersuasive. Even assuming that the affidavits of three satisfied customers[3] are sufficient to show that customer satisfaction with Mrs. Leffel was high, this is not a contested point. Proof of high customer satisfaction falls far short of evidence that refutes the defendants' proffered reasons for Mrs. Leffel's probation and termination.[4]

The plaintiff also asks the court to reconsider, light of Mrs. Sorenson's affidavit, the timing of the events involved in this case, *i.e.*, that the alleged discrimination occurred after Mrs. Leffel claims that her condition was disclosed. As discussed above, however, Mrs. Sorenson's testimony does not contain anything more than general assertions that Mrs. Leffel was qualified, intelligent, fair, and customer service oriented; it does not address any of

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[3] Mrs. Leffel submitted the affidavits of Mr. and Mrs. Rajski, who were customers of the Bank while Mrs. Leffel was there, in response to the motion for summary judgment.

[4] Mrs. Watterud's affidavit also states the following: "I was in Florida. Another Bank represent. called me. Told me Mrs. Leffel had left. Not knowing the why's. She did not want me to here [sic] from somewhere else. This occured [sic] in 1993." Aff. of Mary F. Watterud, ¶ 10. The court can find nothing in this statement to support the plaintiff's motion for reconsideration.

the deficiencies alleged in Mrs. Leffel's performance by the defendants. Mrs. Sorenson's affidavit at most shows that not every employee who worked with Mrs. Leffel was experiencing problems. This was not, however, the defendants' claim.

Mrs. Leffel also notes allegedly contradictory testimony by Jean Dreaves and Marge Andrysiak contained in their depositions, arguing that one method a plaintiff can show pretext is by showing that the defendant's witnesses lack credibility. The court acknowledges the potential role of credibility determinations in employment discrimination cases, especially when questions of motive and intent exist. These arguments, however, are admittedly not based on any new evidence. Mrs. Leffel cannot rely on factual information available to her before the close of briefing on the summary judgment motion, or on the arguments she asserted in opposition to the summary judgment motion. *See Federal Deposit Ins. Corp. v. Meyer,* 781 F.2d 1260, 1268 (7th Cir. 1986); *see also Figgie Int'l v. Miller,* 966 F.2d 1178, 1180 (7th Cir. 1992). Further, as the defendants argue in their response to the motion, Mrs. Leffel does not point to specific portions of the depositions, and the court will not comb the record for evidence to warrant a trial.

Even when the additional affidavits are taken into consideration, they do not contain evidence that convinces the court that manifest error of fact or law has occurred in the granting of summary judgment in favor of the defendants in this case. The plaintiff's new arguments do not present a material issue of fact for trial, so the court GRANTS the plaintiff's motion to supplement the motion for reconsideration (filed Sept. 8, 1995) (#71)),

and DENIES the plaintiff's motion for reconsideration (filed Sept. 6, 1995 (#69)).

SO ORDERED.

ENTERED: December 13, 1995

/s/ Robert L. Miller, Jr.
Robert L. Miller, Jr., Judge
United States District Court

cc: R. Yingst
J. Johnson, C. Nichols

United States District Court

Northern District of Indiana

JO ANN LEFFEL
PLAINTIFF

v.

VALLEY FINANCIAL SERVICES
VALLEY AMERICAN BANK AND
TRUST COMPANY,

DEFENDANTS

JUDGMENT IN
A CIVIL CASE

Case No.
3:94CV459RLM

[ ] **Jury Verdict.** This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[XX] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the judgment was granted in favor of the defendants and against plaintiff.

This document entered pursuant to Rules 79(A) and 58 of the Federal Rules of Civil Procedure on:

August 24, 1995

STEPHEN R. LUDWIG, CLERK

By /s/ Kathy Swaney
Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

JO ANN LEFFEL, Plaintiff	)	
vs.	)	CAUSE NO.
VALLEY FINANCIAL SERVICES, and VALLEY AMERICAN BANK, Defendants	)	3:94CV0459RM

MEMORANDUM AND ORDER

Plaintiff Jo Ann Leffel brought this action against defendants alleging discrimination in violation of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* She contends that she was discharged from her employer (Valley American Bank) because she was perceived to be disabled as a result of multiple sclerosis. She sues the Bank and an affiliated company, Valley Financial Services. This cause is now before the court on defendants' motion for summary judgment and defendants' motion to strike certain exhibits offered by plaintiff in her opposing brief. For the reasons set forth below, the court grants the defendants' motion to strike in part and grants defendants' motion for summary judgment.

I.

Before addressing the merits of defendants' summary judgment motion, the court must address defendants' motion to strike, which challenges certain exhibits to

Plaintiff's Opposition to Summary Judgment as being inadmissible. The defendants claim that three exhibits lack proper foundation, that two affidavits were improperly executed and contain hearsay, and that the plaintiff's affidavit contains so much hearsay and statements not based on personal knowledge as to warrant being stricken in its entirety.

In deciding a summary judgment motion, a court should not rely on unauthenticated documents filed as addenda to the motion. *Vukadinovich v. Board of Sch. Trustees*, 776 F. Supp. 1325, 1326 (N.D. Ind. 1991), *aff'd*, 978 F.2d 403 (7th Cir. 1992), *cert. denied*, 114 S. Ct. 133 (1993); *Roloff v. Sullivan*, 772 F. Supp. 1083, 1088 (N.D. Ind. 1991); *see also* N.D. Ind. L.R. 56.1 (requiring "admissible evidence" in opposition to a motion for summary judgment). "To be admissible, documents must be authenticated by and attached to an affidavit that meets the requirements of Rule 56(e), and the affiant must be a person through whom the exhibits could be admitted into evidence." *Vukadinovich*, 776 F. Supp. at 1327 (citing 10A C. Wright et. al., *Federal Practice and Procedure* § 2722 (2d ed. 1983)).

The defendants claim that the plaintiff did not authenticate exhibit 10, which purports to be an insurance medical form. The defendants correctly state that Ms. Leffel neither explicitly indicated the source of the document nor stated that she in fact signed the document. Ms. Leffel's signature appears on the form, however, and Ms. Leffel's affidavit states that she "filled out some medical forms" attached thereto as exhibit 10, (Plaintiff's Opposition to Summary Judgment, at 4). Valley American Bank produced the document in response

to a request to produce, and Ms. Leffel has provided a supplemental affidavit stating that she signed the document and that it was given to her at the December 18, 1992 insurance meeting, (Exhibit 2 to Plaintiffs Memorandum of Law in Response to Defendants Motion to Strike). For these reasons, the court finds that exhibit 10 has been sufficiently identified as to support a finding that it is the insurance form plaintiff claims she signed on December 18, 1992, *see* Fed. R. Evid. 901(a), and denies defendants' motion to strike exhibit 10.

Defendants claim plaintiff did not properly authenticate exhibit 21, which purports to be a copy of a page from Dun & Bradstreet's *Million Dollar Directory*. Ms. Leffel does indicate the source of the document in the Memorandum in Opposition to Summary Judgment, Ms. Leffel's affidavit does not specifically attest to its accuracy, and the exhibit itself does not include a cover page. Ms. Leffel states in her Memorandum of Law in Response to Defendants Motion to Strike that the information regarding the source of the document was omitted by error, and attaches as exhibit 3 thereto a copy of the book's cover page. The court sees no reason not to allow Ms. Leffel to correct such an omission, and because the information is now before the court, the court denies the defendants' motion to strike exhibit 21.

The defendants next object to Exhibit 23, a month-end activity report, as having no identifying characteristics and no authenticating information. In her affidavit, Ms. Leffel states that she is personally familiar with the document, and she identifies it in her supplemental affidavit; as such Ms. Leffel has sufficiently authenticated the

document under Fed. R. Evid. 901(a). The defendants' motion to strike Exhibit 23 is denied.

The defendants next contend that the affidavits in Exhibit 6 are not properly executed and do not contain admissible evidence. Properly executed versions of these affidavits have been received. The defendants also object to specific paragraphs of the affidavits. They object to Mr. Rajski's statement that somebody at the Bank told him that Ms. Leffel had suffered a nervous breakdown, and Mrs. Rajski's statement that her husband told her that he had been told by a bank employee that Ms. Leffel had suffered a nervous breakdown.

Mr. Rajski's statement that he was told by a bank employee that Ms. Leffel had suffered a nervous breakdown is not offered by the plaintiff to prove that Ms. Leffel had a nervous breakdown; it is offered to show that the statement was made. The statement is therefore not hearsay. Fed. R. Evid. 801(c). Mrs. Rajski's statement about what Mr. Rajski was told about Ms. Leffel is not based on personal knowledge, however, and is therefore inadmissible as proof that the statement was made. Mr. Rajski's statement is offered to prove its contents' truth: that the bank employee made a particular statement to him.

Finally, the defendants assert that Ms. Leffel's affidavit should be stricken in its entirety because the statements contained therein are her opinions and legal conclusions, and do not set forth facts that would be admissible. Rule 56(e) requires affidavits to set forth facts based on personal knowledge; legal arguments are not recitations of fact to which an affiant is competent to

testify, and may be disregarded. *Pfeil v. Rogers*, 757 F.2d 850, 862 (7th Cir. 1985); *see also Toro Co. & Toro Credit Co. v. Krouse, Kern, & Co.*, 644 F. Supp. 986, 989 (N.D. Ind. 1986). Ms. Leffel's statements of opinions can be disregarded, but do not constitute grounds to strike the entire affidavit.

The following portions of Ms. Leffel's affidavit are inadmissible either as speculation or legal argument, and will be given no weight in deciding the summary judgment motion: (1) the disclosure of her medical condition caused the actions taken against her at the Bank (in ¶ 8); (2) Ms. Andrysiak's state of mind and the Bank's motivation for changing insurance plans (in ¶ 11); (3) how others perceived Ms. Leffel and that she was discriminated against (in ¶ 12); (4) Ms. Curtis's statement that others told her not to talk to Ms. Leffel (in ¶ 28); (5) the Bank officials' state of mind regarding her medical condition and job performance (in ¶ 29); and (6) that others told Ms. Leffel of having been told that she had a nervous breakdown.

The defendants also object to the portions of paragraph 9 that state that the Bank was aware of Ms. Leffel's medical condition, and that Ms. Dreaves told Ms. Leffel that she had told a secretary in human resources about Ms. Leffel's medical condition. Ms. Leffel attempts to bring in these statements as party admissions under Fed. R. Evid. 801(d)(2)(D) because they constitute an admission by a Bank employee (the secretary in human resources). This argument fails with respect to the bank because the declarant, Ms. Dreaves, is an employee of Valley Insurance, not a Bank employee. Ms. Leffel next argues that Ms. Dreaves was acting as an agent for the

Bank and that the statement related to the scope of her agency, but there is nothing in the record to suggest that Ms. Dreaves was acting as an agent for the Bank when Ms. Leffel confronted her. Accordingly, Ms. Dreaves' report of the secretary's admission is hearsay.

Ms. Leffel's statement in paragraph 9 relating to the knowledge of the Bank in general is speculation not based on personal knowledge, and is therefore inadmissible.

A.

A party seeking summary judgment must demonstrate that no genuine issue of fact exists for trial and that the movant is entitled to judgment as a matter of law. If that showing is made and the motion's opponent would bear the burden at trial on the matter that forms the basis of the motion, the opponent must come forth with evidence to show what facts are in actual dispute. A genuine factual issue exists only when there is sufficient evidence for a jury to return a verdict for the motion's opponent. Summary judgment should be granted if no reasonable jury could return a verdict for the motion's opponent.

The parties cannot rest on mere allegations in the pleadings, or upon conclusory allegations in affidavits. The court must construe the facts as favorably to the non-moving party as the record will permit, and draw any permissible inferences from the materials before it in favor of the non-moving party, as long as the inferences are reasonable. The non-moving party

> must show that the disputed fact is material, or outcome-determinative, under applicable law.

Conery v. Bath Associates, 803 F. Supp. 1388, 1392-1393 (N.D. Ind. 1992) (citations omitted). Special caution should be exercised in approaching summary judgment motions in employment discrimination cases, *Holland v. Jefferson Nat'l Life Ins. Co.*, 883 F.2d 1307, 1313 (7th Cir. 1989), but summary judgment may be appropriate even in cases involving issues of motive, intent, or state of mind. *Visser v. Packer Eng'g Assoc., Inc.*, 924 F.2d 655, 660 (7th Cir. 1991); *see also DePriest v. Seaway Foodtown Inc.*, 543 F. Supp. 1355 (E.D. Mich. 1982).

B.

Jo Ann Leffel worked for Valley American Bank ("the Bank") from April of 1980 to April of 1993, for a total of thirteen years. From 1988 on, she held the position of branch manager for the Downtown Mishawaka Branch Office. Until the events that led to this lawsuit, no formal disciplinary procedures had ever been instituted regarding Ms. Leffel. According to Ms. Leffel, she was an exemplary employee who consistently earned average to above average marks on annual reviews. Though the defendants disagree with many of Ms. Leffel's characterizations of her own job performance, they concede that, historically, she performed her duties as employee and manager competently.

Ms. Leffel was diagnosed as having multiple sclerosis ("MS") in 1979. Before the events leading to this lawsuit began, Ms. Leffel's MS did not significantly hinder her

performance at work; she neither required nor requested accommodation for her condition.

On December 18, 1992, about fifty employees of the Bank, including Ms. Leffel, attended a meeting held by Valley Insurance regarding the Bank's decision to change its health insurance plan because of an impending increase in premiums under the current plan. Those who would be affected by the change attended the meeting. According to Ms. Leffel, Margaret Andrysiak, the Bank's Director of Human Resources, stated at that meeting, "It's because of you folks that we are here," referring to certain employees present at the meeting who had made many medical insurance claims because of their medical conditions. At the insurance meeting, Ms. Leffel filled out and signed a medical form in which she disclosed her MS. At this meeting, Ms. Leffel expressed her desire that the information provided on the medical form be kept confidential.

In early 1993, Ms. Leffel asserts that Ms. Dreaves (the Valley American Insurance representative) contacted a Bank personnel secretary, who in turn contacted Ms. Andrysiak, and said that further information was needed about Ms. Leffel in connection with Ms. Leffel's change in insurance from Blue Cross/Blue Shield to an HMO. Ms. Leffel contends that a "panic call" was then placed from Ms. Andrysiak to Carolyn Teeter (Ms. Leffel's assistant) instructing her to tell Ms. Leffel to contact Valley American Insurance immediately. Ms. Leffel went to see Ms. Dreaves, who told her that there was a problem with her

insurance and that she needed to fill out more information.[1]

Ms. Leffel's supervisor, Ms. Peffley, conducted a performance appraisal of Ms. Leffel in December 1992. Ms. Leffel received an "Overall Performance" factor of "2+" on a scale from zero to four, four being the highest. A performance factor of "2" is described as "[p]erformance meets, or in some aspects exceeds requirements of the position"; a performance factor of "3" is described as "[p]erformance frequently exceeds job requirements in several aspects; better than satisfactory employees with similar responsibilities; attains good accomplishments and end results. Minimum direction required." Ms. Leffel received performance factors of two, three, or four in all areas except "Timeliness", in which she received a "1", which is described as "[p]erformance is barely adequate . . . must be monitored on a monthly basis. . . . Lack of improvement will be cause for dismissal.

The course of events that led to Ms. Leffel's termination[2] from the Bank began in early 1993, after the December 1992 performance appraisal. Sheila Ann Swinehart, a

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[1] In her concern for the confidentiality of her medical information, Ms. Leffel then asked Ms. Dreaves with whom she had discussed her medical condition. As noted in the ruling on the motion to strike, there is no admissible evidence of Ms. Dreaves' response. Ms. Andrysiak conceded in her deposition that Ms. Leffel's MS "may have" come up in her conversation with the insurance representative, but that evidence is far too speculative to support a finding that it is more likely than not that Ms. Dreaves told Ms. Andrysiak of Ms. Leffel's MS.

[2] The defendants concede, for purposes of this motion only, that Ms. Leffel was terminated.

part-time teller at the Bank, contacted Ms. Andrysiak with concerns regarding Ms. Leffel: that there was a communication breakdown between Ms. Leffel and her staff, that Ms. Leffel appeared overly medicated, and that she, Ms. Teeter, and Lisa Curtis (a staff member) were concerned about Ms. Leffel. Shortly after that, at Ms. Andrysiak's suggestion, a breakfast meeting was held at a local pancake house for the staff at the downtown Mishawaka branch to discuss the concerns regarding Ms. Leffel. Ms. Teeter, Ms. Curtis, Ms. Swinehart, Ms. Andrysiak, and Debra Peffley (Bank Center Administrator and Ms. Leffel's supervisor) attended the meeting. Ms. Leffel was not invited to attend. Among the topics discussed at the breakfast meeting were "lack of information coming from meetings, not knowing what was going on, work not being completed on time, and Jo Ann's absence from the bank and they were covering for her," that she complained of stress and headaches, that she took a lot of prescription drugs, and that "she might be overly medicated."

Ms. Leffel's alleged problems then were brought to the attention of Bank Executive Vice President Jerome Kearns, who discussed them with Bank President Denny Schwartz, who possesses the authority to terminate an employee of the Bank. Mr. Kearns discussed with Mr. Schwartz his and Ms. Peffley's recommendation that Ms. Leffel be placed on a 30-day probation, and that necessary action would be taken, including the possibility of termination, if the situation did not improve.

On March 15, 1993, Mr. Kearns, Ms. Peffley, Ms. Andrysiak, and Ms. Leffel attended a disciplinary meeting regarding Ms. Leffel. Mr. Kearns read to Ms. Leffel a list of ten areas of concern:

A. Excessive absenteeism

B. New account problems at [downtown] Mishawaka

C. Complaints from other departments that phone calls are not returned

D. Cash items complaints for Mishawaka Municipal Utilities

E. Br[anch] Administration staff feeling the need to avoid dealing directly with JoAnn

F. Continual absence of timely reporting

G. Staffing problems created by JoAnn at [downtown] Mishawaka

H. Approving time off for hourly staff without approval

I. Complaints from [downtown Mishawaka] staff (from various sources) that they are not receiving information on a timely basis

J. Reluctance to attend required scheduled meetings

According to Ms. Leffel, as the concerns were read to her, she tried to explain her actions and sought clarification of certain items, but received no responses to her explanations and little clarification. Mr. Kearns then read to Ms. Leffel a document entitled "Required Standards of Performance for Jo Ann Leffel," reading through it, according to Ms. Leffel, in the same way as the first document.

The last document discussed at the meeting was entitled "Probationary Status Effective March 16, 1993," which explained that Ms. Leffel was being put on probationary status and would be terminated if she failed to meet and keep the Required Standards of Performance outlined in the second document. The document also described the monitoring process, delineating who would be responsible for monitoring Ms. Leffel with respect to each of the items listed on the Required Standards of Performance.

The last document also listed "other options" available to Ms. Leffel. These options, which were also discussed at the meeting, were: (1) unpaid personal leave of absence; (2) paid medical leave; and (3) resignation. Though Ms. Leffel denied that her MS was affecting her work, she was given long-term disability paperwork for her doctor to sign. Ms. Leffel signed the three documents, but she denies agreeing with or acknowledging any of the concerns raised in the meeting.

Also at the March 15 meeting, Ms. Leffel informed Mr. Kearns, Ms. Peffley, and Ms. Andrysiak that she suffered from MS. The tone of the meeting led Ms. Leffel to believe they already knew; in their respective affidavits, Mr. Kearns and Ms. Peffley state that they had no knowledge of Ms. Leffel's MS before that meeting. Ms. Andrysiak states that she did not recall having learned of Ms. Leffel's MS until being reminded of it at the meeting, and that she "never disclosed JoAnn Leffel's condition to Jerome Kearns or Debra Peffley."

Ms. Leffel reports that she was told at the March 15 meeting she had to inform her staff that she had MS,

though she expressed her desire not to do so. She informed her staff the next day.

Shortly after the meeting, Ms. Leffel gave her doctor the long-term disability papers to sign. Her doctor refused to sign the papers because he felt that she could continue in her job.

A follow-up meeting was held on April 8, 1993 to discuss Ms. Leffel's behavior and performance since the institution of the probationary status; Mr. Kearns, Ms. Peffley, Ms. Andrysiak, and Ms. Leffel were present. Ms. Leffel was given a document entitled "Follow-Up Report on Probationary Status for JoAnn Leffel," which contained items describing Ms. Leffel's behavior during the probationary period. Mr. Kearns read the report in the same fashion (according to Ms. Leffel) as he had read the lists of concerns and required standards of performance during the March 15 meeting. As stated in the follow-up report, Mr. Kearns informed Ms. Leffel that her behavior "had become more bizarre." The Follow-Up Report lists seven examples of Ms. Leffel's "bizarre" behavior:

1) Punching in arrival and departures times on the safe deposit clock;

2) Acting paranoid when support staff talk with the Assistant Manager;

3) Questioning the sanity of the Assistant Manager;

4) Failing to communicate with all members of her staff such as not advising that a float would be there for a week and ignoring the Assistant Manager;

5) BAC information is not fully disseminated to support staff and when brought to attention is not covered in subsequent meetings;

6) Reports are slow in being distributed, such as ETS for February;

7) High anxiety over her medical condition and the fear that the Bank does not want her to collect [long term disability] benefits.

Ms. Leffel again tried to explain some of the items. The Report further stated:

> Due to the continuing turmoil in the [downtown] Mishawaka office plus the concern that the Bank could lose employees from this location, senior management feels the necessity to require Joann to take a medical leave of absence, if this is the reason for the behavioral change. A long-term disability form will need to be completed by her physician and accepted by the insurance carrier. Otherwise, the only alternative is termination from the Bank.

Ms. Leffel signed the document. April 8, 1993 was the last day that Ms. Leffel worked for the Bank. Bank staff later told a customer that Ms. Leffel had left the Bank as a result of a nervous breakdown.

Valley American Bank and Valley American Services ("VA Services") are, respectively, banking and financial institutions organized and doing business under the laws of the State of Indiana. The Bank concedes that it is an employer for purposes of the Americans with Disabilities Act. VA Services, however, argues that it was never Ms. Leffel's employer, and is not an employer for purposes of

the ADA, since it had no employees up until and including 1993, Ms. Leffel asserts that VA Services has 359 employees, and that under the ADA, the Bank and VA Services may be treated as one integrated enterprise by virtue of their close affiliation.

II.

The Americans With Disabilities Act ("ADA") provides that no employer "shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to . . . discharge of employees . . . and other terms, conditions, and privileges of employment. 42 U.S.C. § 12112(a). A plaintiff alleging discrimination in violation of the Act may present either direct or circumstantial evidence of discrimination. *DeLuca v. Winer Indus., Inc.*, 53 F.3d 793, 797 (7th Cir. 1995).

Ms. Leffel has not presented direct proof of discrimination, and the parties have instead analyzed the plaintiff's ADA claim using the indirect proof method established for Title VII cases in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973) and its progeny, *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089 (1981) and *St. Mary's Honor Ctr. v. Hicks*, ___ U.S. ___, 113 S. Ct. 2742 (1993). Though the Seventh Circuit has declined to formally adopt such an analysis, *see DeLuca*, 53 F.3d at 793, 797; *Hedberg v. Indiana Bell Telephone Co.*, 47 F.3d 928, 933 n.5, it and other courts have analyzed ADA cases using this method. *See, e.g. Graver v. Nat'l Eng'g Co.*, No. 94-C-1228, 1995 WL 443944 (N.D. Ill. July 25, 1995); *Wagner v. Kester Solder Co.*, No. 94-C-65039, 1995 WL 399484,

at *9 (N.D. Ill. June 28, 1995), *Schartle v. Motorola, Inc.*, No. 93-C-5508, 1994 WL 323281 (N.D. Ill. June 24, 1994).

Under the *McDonnell Douglas* analysis, a plaintiff may establish a prima facie case of discrimination by showing sufficient evidence to allow an inference of a causal link between the plaintiff's disability and termination or other negative treatment. *McDonnell Douglas Corp.*, 411 U.S. at 802. A plaintiff proves a prima facie case of discrimination by showing that (1) plaintiff is a member of protected class; (2) plaintiff's performance meets the employer's legitimate job expectations; (3) plaintiff was terminated or treated differently; and (4) the employer sought a replacement for the plaintiff's position or employees not in the protected class were treated more favorably. *McDonnell Douglas*, 411 U.S. at 802; *Wagner v. Kester Solder Co., Div. of Litton Sys.*, No. 94-C-6039, 1995 WL 399484, at *9 (N.D. Ill. June 28, 1995).

If plaintiff can make out the prima facie case, a presumption of discrimination is created, which the defendant may rebut by articulating legitimate, nondiscriminatory reasons. *Burdine*, 450 U.S. at 254. The burden then returns to the plaintiff to show that the reason given by the defendant is merely a pretext for discrimination, and the ultimate burden of proving intentional discrimination remains with the plaintiff throughout the case. *Burdine*, 450 U.S. at 253-55; *McDonnell Douglas*, 411 U.S. at 802-04.

III.

Ms. Leffel contends that as a result of her disclosure that she had MS on the medical form at the December

1993 meeting, her staff and coworkers, afraid of her MS and wishing not to have to work with her, began making meritless accusations about her job performance and behavior; her superiors, she claims, acted on these accusations as a way of covering up their own discrimination against her.

For purposes of this summary judgment motion, the court will examine whether Ms. Leffel can survive summary judgment in her allegations that the Bank discriminated against her because of her disability in (1) putting her on probation, or (2) terminating her. The Bank concedes for this motion that Ms. Leffel was terminated, but contests Ms. Leffel's ability to prove the first, second, and fourth elements of the prima facie case, and her ability to show, overall, that the Bank discriminated against her because of her disability.

A.

First, Ms. Leffel claims that she is within the protected class. The ADA defines a disability as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such an impairment." 42 U.S.C. 12102(2). The term "major life activities" refers to "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i).

The ADA protects those "regarded as having" a disabling impairment to disabuse people of the myths they

may hold about the disabled and to prohibit discrimination against those with impairments that do not substantially limit major life activities. *Wagner v. Kester Solder Co., Div. of Litton Sys.*, No. 94-C-6039, 1995 WL 399484, at *9 (N.D. Ill. June 28, 1995). Ms. Leffel claims that though she does not have a physical or mental impairment that limits any major life activity, she qualifies as disabled for purposes of the ADA because she was regarded as having such an impairment. She claims to have an impairment (1) that is not substantially limiting but is perceived by her employer as constituting a substantially limiting impairment, and (2) which is only substantially limiting because of the attitudes of others toward the impairment. *See* 29 C.F.R. § 1630.2(1).

It is questionable whether Ms. Leffel has presented sufficient evidence to allow a reasonable factfinder to conclude that it is more likely than not that she was regarded as having a disability. Even if she is assumed to have been in the protected class, however, she has not raised a genuine issue regarding whether, when she was placed on probation, her performance met her employer's legitimate expectations.

The Bank asserts that it put Ms. Leffel on probation because of the complaints it received regarding her behavior and job performance. Ms. Leffel's claim that she was performing satisfactorily necessarily overlaps with the Bank's explanation for why Ms. Leffel was put on probation; thus the analysis collapses into a single inquiry: whether Ms. Leffel has created a reasonable inference that the Bank's stated reason for placing her on progatino was a pretext for disability discrimination. *See*

President v. Illinois Bell Tel. Co., 865 F. Supp. 1279, 1285 (N.D. Ill. 1994).

To establish that an employer's proferred reasons are a pretext for discrimination, an employee may show either than the employer was more likely motivated by a discriminatory reason or that the employer's reason is not worthy of credence. *Karazanos v. Navistar Int'l. Transp. Corp.*, 948 F.2d 332 (7th Cir. 1991); *Johnson v. University of Wisconsin-Milwaukee*, 783 F.2d 59, 63 (7th Cir. 1986). To carry this burden, Ms. Leffel must show that she was put on probation because of the Bank's perception of her disability, *Dale v. Chicago Tribune Co.*, 797 F.2d 458, 464-65 (7th Cir. 1986), *cert. denied*, 479 U.S. 1066 (1987); *Golomb v. Prudential Ins. Co.*, 688 F.2d 547, 550 (7th Cir. 1982), *i.e.* that her perceived disability was a determining factor. *Dale v. Chicago Tribune*, 797 F.2d at 464.

Ms. Leffel offers a variety of evidence to prove that she was meeting the Bank's expectations, including her yearly performance appraisals from 1990, 1991, and 1992, a letter from a satisfied customer, the Rajski affidavit, and her own assertions that she was an exemplary employee and that the defendants' proffered reasons for disciplining her were meritless. Ms. Leffel's evaluation for 1992 contains good to excellent ratings in almost all areas, but most of this evidence speaks to Ms. Leffel's performance before the time in question, which was concededly at least adequate, and lends little support to her claims that the complaints in early 1993 were without any basis.

The defendants have offered the reasons given to Ms. Leffel at the disciplinary meeting as the reasons for her being placed on probation. In response, Ms. Leffel makes

the general assertion that the reasons given are "all meritless" and addresses some of the concerns specifically. She also makes the conclusory assertion that she was an exemplary employee during the relevant time period; that assertion is insufficient, as a matter of law, to support an inference that she was meeting her employer's legitimate requirements. *Dale v. Chicago Tribune*, 797 F.2d at 465; *Huhn v. Koehring*, 718 F.2d 239, 244 (7th Cir. 1983).

Ms. Leffel offers in her affidavit the explanations for the deficiencies discussed at the disciplinary meeting. For many of the concerns, Ms. Leffel's response at the meeting was "I asked what this was referring to" or "I asked for an explanation." For others, she offered explanations, but the explanations do not refute the concerns. For example, other departments complained that Ms. Leffel was not returning phone calls; her response was that she prioritized her calls and returned the important ones. In response to the complaint that her reporting was continually late – a complaint presaged by her low score in "Timeliness" in her December 1992 evaluation – she explains that month-end reporting was very difficult. To the concern "reluctance to attend required meetings," her response was that she tried to explain what she did some mornings before the bank opened. Ms. Leffel has not offered any additional explanations of these events, and in any event, explaining a failure to meeting legitimate expectations is not the same as meeting them.

Other than her general assertion that the Bank's complaints were all meritless, Ms. Leffel simply presents no specific facts in opposition to the Bank's offered reasons for her being put on probation. The explanations she offers do not refute the specific performance deficiency

cited. Ms. Leffel's general assertion that the evidence she has offered "questions the legitimacy" of the Bank's performance requirements is merely a conclusion that cannot create a genuine factual issue.

Even if she could prove that she had been performing adequately, Ms. Leffel has not presented evidence that would allow a factfinder to conclude that the Bank more likely than not was motivated by discriminatory reasons or that the reasons it gave are not worthy of credence. *Dale v. Chicago Tribune*, 797 F.2d at 464 (1986). Ms. Leffel asserts that the staff had an aversion to a customer with MS, but she offers no comparison of how her symptoms (which she apparently believed were not such as to disclose the existence of her MS without disclosure by the insurance people) compared to the customer's symptoms that created the discomfort. She asserts the Bank faced higher medical insurance premiums, but offers no evidence of the impact her probation and termination would have on those premiums. She reports she and others had been told "It's because of you folks that we are here" at the December insurance meeting, but offers no suggestion that others toward whom the remark was directed were placed on probation or discharged. She complains that the disciplinary meeting agenda was predetermined, that she was given only vague goals and not specific guidelines at the disciplinary meeting, that her explanations were not acknowledged and that complete indifference was shown to her concerns, but the record permits no inference that management style differed with respect to persons not regarded as having a disability. Finally, she notes that she was given the option of taking long-term disability leave if she could meet the criteria,

which is insufficient, standing alone, to allow an inference that she would not have been put on probation had she not been perceived as having a disability. Whether alone or in combination, the cited evidence is insufficient to meet the plaintiff's burden of persuasion.

Because Ms. Leffel has not presented evidence sufficient to demonstrate that the reasons given by the defendant are false, the Bank is entitled to judgment as a matter of law with respect to the decision to place her on probation. *See St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. at 2752.

B.

Even if Ms. Leffel cannot prove that perceptions of disability infected the decision to place her on probation, the decision to terminate her still must be considered. Whatever doubts may exist as to whether Ms. Leffel was regarded as having a disability when she was placed on probation need not plague analysis of the termination decision; even if the decision-makers had no prior knowledge, Ms. Leffel told them of her MS on March 15. Again, however, the evidence before the court is insufficient to establish that Ms. Leffel's job performance was adequate and the reasons proffered by the Bank for her termination were a pretext for disability discrimination.

The Bank asserts that, though some areas of Ms. Leffel's performance improved, her overall performance remained unsatisfactory. The follow-up report that was discussed with Ms. Leffel at the meeting when she was terminated lists seven examples of "bizarre" behaviors. The report also states that as a result of the "continuing

turmoil" at the Mishawaka office and the Bank's fear that other employees might leave that location if forced to continue to work with Ms. Leffel, Ms. Leffel must either take long-term disability if she qualifies, or be terminated.

Ms. Leffel again asserts that the complaints have no merit, and that that Bank is making false accusations to cover up its illegal discrimination against her. Aside explaining why she was punching the time clock, Ms. Leffel does not address the events or behaviors with specific facts to refute the proffered reasons. She offers what she claims to be a month and activity report; that document seems to relate to the Bank's performance generally, but without further explanation, the court cannot find that the document supports Ms. Leffel's claims of her own satisfactory performance.

Ms. Leffel has not shown that the Bank was more likely motivated by a discriminatory reason or that their reason is not worthy of credence. *Karazanos v. Navistar Int'l Trans. Corp.*, 948 F.2d 332 (7th Cir. 1991); *Johnson v. University of Wisconsin-Milwaukee*, 783 F.2d 59, 63 (7th Cir. 1986). Again, she maintains that the Bank terminated her because of the fears the staff had regarding MS and because the Bank wanted to cut its medical insurance costs.

As evidence of the Bank's true reasons, Ms. Leffel points to her assertions of the staff's fear of a customer with MS, the comment made at the insurance meeting, and that some of Ms. Leffel's staff expressed a desire that she not return to that location. Ms. Leffel also points to the fact that she was again offered medical leave, and that

one of the "bizarre" behaviors listed on the Follow-Up Report was "[h]igh anxiety over her medical condition and the fear that the Bank does not want her to collect LTD benefits." All but the last point were discussed in the preceding section. Because Ms. Leffel explains, but does not deny, her "high anxiety", its inclusion in the Follow-Up Report cannot be proof of pretext.

Although Ms. Leffel asserts her own reasons as to why the Bank wanted to get rid of her, the facts that she presents amount to no more than speculation; they cannot give rise to the inference of intentional discrimination. At most, these facts support the proposition that she was terminated despite her condition, and not because of it. Ms. Leffel clearly wishes she had been give [sic] more of a chance to explain herself, but her evidence would not allow a jury to find that her performance was adequate or that the Bank's stated reason was merely a pretext for intentional discrimination. *See St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. at 2752. The Bank is entitled to summary judgment.

C.

Ms. Leffel's claim against VA Services is based solely on its affiliation with the Bank. The court need not evaluate whether such a claim could prevail under other facts; VA Services' affiliation with the Bank cannot render VA Services liable if the Bank is not shown to have violated the ADA.

IV.

The court does not intend to be understood as agreeing that Ms. Leffel should have been terminated from her job. The only issue before the court is whether the evidence that has been presented would allow of jury, or a judge sitting as factfinder, to infer that Ms. Leffel was treated adversely because she was perceived as having a disability. Because the evidence would not allow such an inference, the defendants' motion for summary judgment (filed June 26, 1995 (#46)) must be, and hereby is, GRANTED.

The court VACATES the final pretrial conference schedule for August 28, 1995 and VACATES the jury trial scheduled to commence September 5, 1995.

SO ORDERED.

ENTERED: August 24, 1995

/s/ Robert L. Miller, Jr.
Robert L. Miller, Jr., Judge
United States District Court

cc: R. Yingst
J. Johnson, C. Nichols

APPENDIX A

Public Law

THE AMERICANS WITH DISABILITIES ACT OF 1990, AS AMENDED

SECTION 1. SHORT TITLE; TABLE OF CONTENTS. *42 USC 12101 note.*

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SEC. 2. FINDINGS AND PURPOSES. *42 USC 12101.*

(a) Findings. – The Congress finds that –

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the Nation's proper goals re regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiently for such individuals; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society

is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(b) Purpose. – It is the purpose of this Act –

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this Act on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

SEC. 3. DEFINITIONS. *42 USC 12102*

As used in this Act:

(1) Auxiliary aids and services. – The term "auxiliary aids and services" includes –

(A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

(B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;

(C) acquisition or modification of equipment or devices; and

(D) other similar services and actions.

(2) Disability. – The term "disability" means, with respect to an individual –

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

(3) State. – The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

TITLE I – EMPLOYMENT

SEC. 101. DEFINITIONS. *42 USC 12111*

As used in this title:

(1) Commission. – The term "Commission" means the Equal Employment Opportunity Commission established by section 705 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-4).

(2) Covered entity. – The term "covered entity" means an employer, employment agency, labor organization, or joint labor-management committee.

(3) Direct threat. – The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.

(4) Employee. – The term "employee" means an individual employed by an employer. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(5) Employer. –

(A) In general. – The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this title, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

(B) Exceptions. – The term "employer" does not include –

(i) the United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or

(ii) a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of the Internal Revenue Code of 1986.

(6) Illegal use of drugs. –

(A) In general. The term "illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act (21 U.S.C. 812). Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

(B) Drugs. – The term "drug" means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act.

(7) Person, etc. – The terms "person", "labor organization", "employment agency", "commerce", and "industry affecting commerce", shall have the same meaning given such terms in section 701 of the Civil Rights Act of 1964 (42 U.S.C. 2000e).

(8) Qualified individual with a disability. – The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this title, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

(9) Reasonable accommodation. – The term "reasonable accommodation" may include –

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

(10) Undue hardship. –

(A) In general. – The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).

(B) Factors to be considered. – In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include –

(i) the nature and cost of the accommodation needed under this Act;

(ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

(iii) the overall financial resources of the covered entity; the overall size of the business of a covered

entity with respect to the number of its employees; the number, type, and location of its facilities; and

(iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

SEC. 102. DISCRIMINATION. *42 USC 12112.*

(a) General Rule. – No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction. – As used in subsection (a), the term "discriminate" includes –

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this title (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration –

(A) that have the effect of discrimination on the basis of disability;

or

(B) that perpetuate the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown

to be job-related for the position in question and is consistent with business necessity; and

(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

(c) Covered Entities in Foreign Countries.

(1) In general. – It shall not be unlawful under this section for a covered entity to take any action that constitutes discrimination under this section with respect to an employee in a workplace in a foreign country if compliance with this section would cause such covered entity to violate the law of the foreign country in which such workplace is located.

(2) Control of Corporation. –

(A) Presumption. – If an employer controls a corporation whose place of incorporation is a foreign country, any practice that constitutes discrimination under this section and is engaged in by such corporation shall be presumed to be engaged in by such employer.

(B) Exception. – This section shall not apply with respect to the foreign operations of an employer that

is a foreign person not controlled by an American employer.

(C) Determination. – For purposes of this paragraph, the determination of whether an employer controls a corporation shall be based on –

(i) the interrelation of operations;

(ii) the common management;

(iii) the centralized control of labor relations; and

(iv) the common ownership or financial control of the employer and the corporation.

(d) Medical Examinations and Inquiries. –

(1) In general. – The prohibition against discrimination as referred to in subsection (a) shall include medical examinations and inquiries.

(2) Preemployment. –

(A) Prohibited examination or inquiry. – Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.

(B) Acceptable inquiry. – A covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions.

(3) Employment entrance examination. – A covered entity may require a medical examination after an offer of

employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if –

(A) all entering employees are subjected to such an examination regardless of disability;

(B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that –

(i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) government officials investigating compliance with this Act shall be provided relevant information on request; and

(C) the results of such examination are used only in accordance with this title.

(4) Examination and inquiry. –

(A) Prohibited examinations and inquiries. – A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless

such examination or inquiry is shown to be job-related and consistent with business necessity.

(B) Acceptable examinations and inquiries. – A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

(C) Requirement. – Information obtained under subparagraph (B) regarding the medical condition or history of any employee are subject to the requirements of subparagraphs (B) and (C) of paragraph (3).

SEC. 103. DEFENSES. *42 USC 12113.*

(a) In General. – It may be a defense to a charge of discrimination under this Act that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this title.

(b) Qualification Standards. – The term "qualification standards" may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.

(c) Religious Entities. –

(1) In general. – This title shall not prohibit a religious corporation, association, educational institution, or society from giving preference in employment to individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

(2) Religious tenets requirement. – Under this title, a religious organization may require that all applicants and employees conform to the religious tenets of such organization.

(d) List of Infectious and Communicable Diseases. –

(1) In general. – The Secretary of Health and Human Services, not later than 6 months after the date of enactment of this Act, shall –

(A) review all infectious and communicable diseases which may be transmitted through handling the food supply;

(B) publish a list of infectious and communicable diseases which are transmitted through handling the food supply;

(C) publish the methods by which such diseases are transmitted; and

(D) widely disseminate such information regarding the list of diseases and their modes of transmissibility to the general public.

Such list shall be updated annually.

(2) Applications. – In any case in which an individual has an infectious or communicable disease that is

transmitted to others through the handling of food, that is included on the list developed by the Secretary of Health and Human Services under paragraph (1), and which cannot be eliminated by reasonable accommodation, a covered entity may refuse to assign or continue to assign such individual to a job involving food handling.

(3) Construction. – Nothing in this Act shall be construed to preempt, modify, or amend any State, county, or local law, ordinance, or regulation applicable to food handling which is designed to protect the public health from individuals who pose a significant risk to the health or safety of others, which cannot be eliminated by reasonable accommodation, pursuant to the list of infectious or communicable diseases and the modes of transmissibility published by the Secretary of Health and Human Services.

SEC. 104. ILLEGAL USE OF DRUGS AND ALCOHOL. *42 USC 12114.*

(a) Qualified Individual With a Disability. – For purpose of this title, the term "qualified individual with a disability" shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.

(b) Rules of Construction. – Nothing in subsection (a) shall be construed to exclude as a qualified individual with a disability an individual who –

(1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

(2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(3) is erroneously regarded as engaging in such use, but is not engaging in such use; except that it shall not be a violation of this Act for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraph (1) or (2) is no longer engaging in the illegal use of drugs.

(c) Authority of Covered Entity. – A covered entity –

(1) may prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees;

(2) may require that employees shall not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace;

(3) may require that employees behave in conformance with the requirements established under the Drug-Free Workplace Act of 1988 (41 U.S.C. 701 et seq.);

(4) may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee; and

(5) may, with respect to Federal regulations regarding alcohol and the illegal use of drugs, require that –

(A) employees comply with the standards established in such regulations of the Department of

Defense, if the employees of the covered entity are employed in an industry subject to such regulations, including complying with regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Department of Defense);

(B) employees comply with the standards established in such regulations of the Nuclear Regulatory Commission, if the employees of the covered entity are employed in an industry subject to such regulations, including complying with regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Nuclear Regulatory Commission); and

(C) employees comply with the standards established in such regulations of the Department of Transportation, if the employees of the covered entity are employed in a transportation industry subject to such regulations, including complying with such regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Department of Transportation).

(d) Drug Testing. –

(1) In general. – For purposes of this title, a test to determine the illegal use of drugs shall not be considered a medical examination.

(2) Construction. – Nothing in this title shall be construed to encourage, prohibit, or authorize the conducting of drug testing for the illegal use of drugs by job applicants or employees or making employment decisions based on such test results.

(e) Transportation Employees. – Nothing in this title shall be construed to encourage, prohibit, restrict, or authorize the otherwise lawful exercise by entities subject to the jurisdiction of the Department of Transportation of authority to –

(1) test employees of such entities in, and applicants for, positions involving safety-sensitive duties for the illegal use of drugs and for on-duty impairment by alcohol; and

(2) remove such persons who test positive for illegal use of drugs and on-duty impairment by alcohol pursuant to paragraph (1) from safety-sensitive duties in implementing subsection (c).

SEC. 105. POSTING NOTICES. *42 USC 12115.*

Every employer, employment agency, labor organization, or joint labor-management committee covered under this title shall post notices in an accessible format to applicants, employees, and members describing the applicable provisions of this Act, in the manner prescribed by section 711 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-10).

SEC. 106. REGULATIONS. *42 USC 12116.*

Not later than 1 year after the date of enactment of this Act, the Commission shall issue regulations in an accessible format to carry out this title in accordance with subchapter II of chapter 5 of title 5, United States Code.

SEC. 107. ENFORCEMENT. *42 USC 12117.*

(a) Powers, Remedies, and Procedures. – The powers, remedies, and procedures set forth in sections 705, 706, 707, 709, and 710 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9) shall be the powers, remedies, and procedures this title provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this Act, or regulations promulgated under section 106, concerning employment.

(b) Coordination. – The agencies with enforcement authority for actions which allege employment discrimination under this title and under the Rehabilitation Act of 1973 shall develop procedures to ensure that administrative complaints filed under this title and under the Rehabilitation Act of 1973 are dealt with in a manner that avoids duplication of effort and prevents imposition of inconsistent or conflicting standards for the same requirements under this title and the Rehabilitation Act of 1973. The Commission, the Attorney General, and the Office of Federal Contract Compliance Programs shall establish such coordinating mechanisms (similar to provisions contained in the joint regulations promulgated by the Commission and the Attorney General at part 42 of title 28 and part 1691 of title 29, Code of Federal Regulations,

and the Memorandum of Understanding between the Commission and the Office of Federal Contract Compliance Programs dated January 16, 1981 (46 Fed. Reg. 7435, January 23, 1981)) in regulations implementing this title and Rehabilitation Act of 1973 not later than 18 months after the date of enactment of this Act.

SEC. 108. EFFECTIVE DATE. *42 USC 12111 note.*

This title shall become effective 24 months after the date of enactment.

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TITLE V – MISCELLANEOUS PROVISIONS

SEC. 501. CONSTRUCTION. *42 USC 12201.*

(a) In General. – Except as otherwise provided in this Act, nothing in this Act shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 790 et seq.) or the regulations issued by Federal agencies pursuant to such title.

(b) Relationship to Other Laws. – Nothing in this Act shall be construed to invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this Act. Nothing in this Act shall be construed to preclude the

prohibition of, or the imposition of restrictions on, smoking in places of employment covered by title I, in transportation covered by title II or III, or in places of public accommodation covered by title III.

(c) Insurance. – Titles I through IV of this Act shall not be construed to prohibit or restrict –

(1) an insurer, hospital or medical service company, health maintenance organization or any agent, or entity that administers benefit plans, or similar organizations from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or

(2) a person or organization covered by this Act from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or

(3) a person or organization covered by this Act from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance.

Paragraphs (1), (2), and (3) shall not be used as a subterfuge to evade the purposes of title I and III.

(d) Accommodations and Services. – Nothing in this Act shall be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit which such individual chooses not to accept.

SEC. 502. STATE IMMUNITY. *42 USC 12202.*

A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this Act. In any action against a State for a violation of the requirements of this Act, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

SEC. 503. PROHIBITION AGAINST RETALIATION AND COERCION. *42 USC 12203.*

(a) Retaliation. – No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this Act or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this Act.

(b) Interference, Coercion, or Intimidation. – It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this Act.

(c) Remedies and Procedures. – The remedies and procedures available under sections 107, 203, and 308 of this Act shall be available to aggrieved person for violations of subsections (a) and (b), with respect to title I, title II and title III, respectively.

SEC. 504. REGULATIONS BY THE ARCHITECTURAL AND TRANSPORTATION BARRIERS COMPLIANCE BOARD. *42 USC 12204.*

(a) Issuance of Guidelines. – Not later than 9 months after the date of enactment of this Act, the Architectural and Transportation Barriers Compliance Board shall issue minimum guidelines that shall supplement the existing Minimum Guidelines and Requirements for Accessible Design for purposes of titles II and III of this Act.

(b) Contents of Guidelines. – The supplemental guidelines issued under subsection (a) shall establish additional requirements, consistent with this Act, to ensure that buildings, facilities, rail passenger cars, and vehicles are accessible, in terms of architecture and design, transportation, and communication, to individuals with disabilities.

(c) Qualified Historic Properties. –

(1) In general. – The supplemental guidelines issued under subsection (a) shall include procedures and requirements for alterations that will threaten or destroy the historic significance of qualified historic buildings and facilities as defined in 4.1.7(1)(a) of the Uniform Federal Accessibility Standards.

(2) Sites eligible for listing in national register. – With respect to alterations of buildings or facilities that are eligible for listing in the National Register of Historic Places under the National Historic Preservation Act (16 U.S.C. 470 et seq.), the guidelines described in paragraph (1) shall, at a minimum, maintain the procedures and requirements established in 4.1.7 (1) and (2) of the Uniform Federal Accessibility Standards.

(3) Other sites. – With respect to alterations of buildings or facilities designated as historic under State or local law, the guidelines described in paragraph (1) shall establish procedures equivalent to those established by 4.1.7(1)(b) and (c) of the Uniform Federal Accessibility Standards, and shall require, at a minimum, compliance with the requirements established in 4.1.7(2) of such standards.

SEC. 505. ATTORNEY'S FEES. *42 USC 12205.*

In any action or administrative proceeding commenced pursuant to this Act, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs, and the United States shall be liable for the foregoing the same as a private individual.

SEC. 506 TECHNICAL ASSISTANCE *42 USC 12206.*

(a) Plan for Assistance. –

(1) In general. – Not later than 180 days after the date of enactment of this Act, the Attorney General, in consultation with the Chair of the Equal Employment Opportunity Commission, the Secretary of Transportation, the Chair of the Architectural and Transportation Barriers Compliance Board, and the Chairman of the Federal Communications Commission, shall develop a plan to assist entities covered under this Act, and other Federal agencies, in understanding the responsibility of such entities and agencies under this Act.

(2) Publication of plan. – The Attorney General shall publish the plan referred to in paragraph (1) for public comment in accordance with subchapter II of chapter 5 of title 5, United States Code (commonly known as the Administrative Procedure Act).

(b) Agency and Public Assistance. – The Attorney General may obtain the assistance of other Federal agencies in carrying out subsection (a), including the National Council on Disability, the President's Committee on Employment of People with Disabilities, the Small Business Administration, and the Department of Commerce.

(c) Implementation. –

(1) Rendering assistance. – Each Federal agency that has responsibility under paragraph (2) for implementing this Act may render technical assistance to individuals and institutions that have rights or duties under the respective title or titles for which such agency has responsibility.

(2) Implementation of titles. –

(A) Title I. – The Equal Employment Opportunity Commission and the Attorney General shall implement the plan for assistance developed under subsection (a), for title I.

(B) Title II. –

(i) Subtitle A. – The Attorney General shall implement such plan for assistance for subtitle A of title II.

(ii) Subtitle B. – The Secretary of Transportation shall implement such plan for assistance for subtitle B of title II.

(C) Title III. – The Attorney General, in coordination with the Secretary of Transportation and the Chair of the Architectural Transportation Barriers Compliance Board, shall implement such plan for assistance for title III, except for section 304, the plan for assistance for which shall be implemented by the Secretary of Transportation.

(D) Title IV. – The Chairman of the Federal Communications Commission, in coordination with the Attorney General, shall implement such plan for assistance for title IV.

(3) Technical assistance manuals. – Each Federal agency that has responsibility under paragraph (2) for implementing this Act shall, as part of its implementation responsibilities, ensure the availability and provision of appropriate technical assistance manuals to individuals or entities with rights or duties under this Act no later than six months after applicable final regulations are published under titles I, II, III, and IV.

(d) Grants and Contracts. –

(1) In general. – Each Federal agency that has responsibility under subsection (c)(2) for implementing this Act may make grants or award contracts to effectuate the purposes of this section, subject to the availability of appropriations. Such grants and contracts may be awarded to individuals, institutions not organized for profit and no part of the net earnings of which inures to

the benefit of any private shareholder or individual (including educational institutions), and associations representing individuals who have rights or duties under this Act. Contracts may be awarded to entities organized profit, but such entities may not be the recipients or [sic] grants described in this paragraph.

(2) Dissemination of information. – Such grants and contracts, among other uses, may be designed to ensure wide dissemination of information about the rights and duties established by this Act and to provide information and technical assistance about techniques for effective compliance with this Act.

(e) Failure to Receive Assistance. – An employer, public accommodation, or other entity covered under this Act shall not be excused from compliance with the requirements of this Act because of any failure to receive technical assistance under this section, including any failure in the development or dissemination of any technical assistance manual authorized by this section.

SEC. 507. FEDERAL WILDERNESS AREAS. *42 USC 12207.*

(a) Study. – The National Council on Disability shall conduct a study and report on the effect that wilderness designations and wilderness land management practices have on the ability of individuals with disabilities to use and enjoy the National Wilderness Preservation System as established under the Wilderness Act (16 U.S.C. 1131 et seq.)

(b) Submission of Report. – Not later than 1 year after the enactment of this Act, the National Council on Disability shall submit the report required under subsection (a) to Congress.

(c) Specific Wilderness Access. –

(1) In general. – Congress reaffirms that nothing in the Wilderness Act is to be construed as prohibiting the use of a wheelchair in a wilderness area by an individual whose disability requires use of a wheelchair, and consistent with the Wilderness Act no agency is required to provide any form of special treatment or accommodation, or to construct any facilities or modify any conditions of lands within a wilderness area in order to facilitate such use.

(2) Definition. – For purposes of paragraph (1), the term "wheelchair" means a device designed solely for use by a mobility-impaired person for locomotion, that is suitable for use in an indoor pedestrian area.

SEC. 508. TRANSVESTITES. *42 USC 12208.*

For the purposes of this Act, the term "disabled" or "disability" shall not apply to an individual solely because that individual is a transvestite.

SEC. 509. COVERAGE OF CONGRESS AND THE AGENCIES OF THE LEGISLATIVE BRANCH. *42 USC 12209.*

(a) Coverage of the Senate. –

(1) Commitment to Rule XLII. – The Senate reaffirms its commitment to Rule XLII of the Standing Rules of the Senate which provides as follows:

"No member, officer, or employee of the Senate shall, with respect to employment by the Senate or any office thereof –

"(a) fail or refuse to hire an individual;

"(b) discharge an individual; or

"(c) otherwise discriminate against an individual with respect to promotion, compensation, or terms, conditions, or privileges of employment

on the basis of such individual's race, color, religion, sex, national origin, age, or state of physical handicap.".

(2) Matters Other Than Employment. –

(A) In General. – The rights and protections under this Act shall, subject to subparagraph (B), apply with respect to the conduct of the Senate regarding matters other than employment.

(B) Remedies. – The Architect of the Capitol shall establish remedies and procedures to be utilized with respect to the rights and protections provided pursuant to subparagraph (A). Such remedies and procedures shall apply exclusively, after approval in accordance with subparagraph (C).

(C) Proposed remedies and procedures. – For purposes of subparagraph (B), the Architect of the Capitol shall submit proposed remedies and procedures to the Senate Committee on Rules and Administration. The remedies and procedures shall be effective upon the approval of the Committee on Rules and Administration.

(3) Exercise of rulemaking power. – Notwithstanding any other provision of law, enforcement and adjudication of the rights and protections referred to in paragraph (2)(A) shall be within the exclusive jurisdiction of the United States Senate. The provisions of paragraph (1), (2)[sic] are enacted by the Senate as an exercise of the rulemaking power of the Senate, with full recognition of the right of the Senate to change its rules, in the same manner, and to the same extent, as in the case of any other rule of the Senate.

(b) Coverage of the House of Representatives. –

(1) In general. – Notwithstanding any other provision of this Act or of law, the purposes of this Act shall, subject to paragraphs (2) and (3), apply in their entirety to the House of Representatives.

(2) Employment in the House. –

(A) Application. – The rights and protections under this Act shall, subject to subparagraph (B), apply with respect to any employee in an employment position in the House of Representatives and any employing authority of the House of Representatives.

(B) Administration. –

(i) In general. – In the administration of this paragraph, the remedies and procedures made applicable pursuant to the resolution described in clause (ii) shall apply exclusively.

(ii) Resolution. – The resolution referred to in clause (i) is House Resolution 15 of the One Hundred First Congress, as agreed to January 3, 1989, or any other provision that continues in effect the provisions of, or is a

successor to, the Fair Employment Practices Resolution (House Resolution 558 of the One Hundredth Congress, as agreed to October 4, 1988).

(C) Exercise of rulemaking power. – The provisions of subparagraph (B) are enacted by the House of Representatives as an exercise of the rulemaking power of the House of Representatives, with full recognition of the right of the House to change its rules, in the same manner, and to the same extent as in the case of any other rule of the House.

(3) Matters other than employment. –

(A) In general. – The rights and protections under this Act shall, subject to subparagraph (B), apply with respect to the conduct of the House of Representatives regarding matters other than employment.

(B) Remedies. – The Architect of the Capitol shall establish remedies and procedures to be utilized with respect to the rights and protections provided pursuant to subparagraph (A). Such remedies and procedures shall apply exclusively, after approval in accordance with subparagraph (C).

(C) Approval. – For purposes of subparagraph (B), the Architect of the Capitol shall submit proposed remedies and procedures to the Speaker of the House of Representatives. The remedies and procedures shall be effective upon the approval of the Speaker, after consultation with the House Office Building Commission.

(c) Instrumentalities of Congress. –

(1) In general. – The rights and protections under this Act shall, subject to paragraph (2), apply with respect to the conduct of each instrumentality of the Congress.

(2) Establishment of remedies and procedures by instrumentalities. The chief official of each instrumentality of the Congress shall establish remedies and procedures to be utilized with respect to the rights and protections provided pursuant to paragraph (1). Such remedies and procedures shall apply exclusively, except for the employees who are defined as Senate employees in section 201(c)(1) of the Civil Rights Act of 1991.

(3) Report to Congress. – The chief official of each instrumentality of the Congress shall, after establishing remedies and procedures for purposes of paragraph (2), submit to the Congress a report describing the remedies and procedures.

(4) Definition of instrumentalities. – For purposes of this section, instrumentalities of the Congress include the following: the Architect of the Capitol, the Congressional Budget Office, the General Accounting Office, the Government Printing Office, the Library of Congress, the Office of Technology Assessment, and the United States Botanic Garden.

(5) Construction. – Nothing in this section shall alter the enforcement procedures for individuals with disabilities provided in the General Accounting Office Personnel Act of 1980 and regulations promulgated pursuant to that Act.

SEC. 510. ILLEGAL USE OF DRUGS. *42 USC 12210.*

(a) In General. – For purposes of this Act, the term "individual with a disability" does not include an individual who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.

(b) Rules of Construction. – Nothing in subsection (a) shall be construed to exclude as an individual with a disability an individual who –

(1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

(2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(3) is erroneously regarded as engaging in such use, but is not engaging in such use; except that it shall not be a violation of this Act for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraph (1) or (2) is no longer engaging in the illegal use of drugs; however, nothing in this section shall be construed to encourage, prohibit, restrict, or authorize the conducting of testing for the illegal use of drugs.

(c) Health and Other Services. – Notwithstanding subsection (a) and section 511(b)(3), an individual shall not be denied health services, or services provided in connection with drug rehabilitation, on the basis of the current

illegal use of drugs if the individual is otherwise entitled to such services.

(d) Definition of Illegal use of drugs. –

(1) In general. – The term "illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act (21 U.S.C. 812). Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

(2) Drugs. – The term "drug" means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act.

SEC. 511. DEFINITIONS. *42 USC 12211.*

(a) Homosexually and Bisexuality. – For purposes of the definition of "disability" in section 3(2), homosexuality and bisexuality are not impairments and as such are not disabilities under this Act.

(b) Certain Conditions. – Under this Act, the term "disability" shall not include –

(1) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

(2) compulsive gambling, kleptomania, or pyromania; or

(3) psychoactive substance use disorders resulting from current illegal use of drugs.

SEC. 512. AMENDMENTS TO THE REHABILITATION ACT. *42 USC 12115.*

(a) Definition of Handicapped Individual. – Section 7(8) of the Rehabilitation Act of 1973 (29 U.S.C. 706(8)) is amended by redesignating subparagraph (C) as subparagraph (D), and by inserting after subparagraph (B) the following subparagraph:

"(C)(i) For purposes of title V, the term 'individual with handicaps' does not include an individual who is currently engaging in the illegal use of drugs, when a covered entity acts on the basis of such use.

"(ii) Nothing in clause (i) shall be construed to exclude as an individual with handicaps an individual who –

"(I) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

"(II) is participating in a supervised rehabilitation program and is no longer engaging in such use; or

"(III) is erroneously regarded as engaging in such use, but is not engaging in such use; except that it shall not be a violation of this Act for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in subclause (I) or (II) is no longer engaging in the illegal use of drugs.

"(iii) Notwithstanding clause (i), for purposes of programs and activities providing health services and services provided under titles I, II and III, an individual

shall not be excluded from the benefits of such programs or activities on the basis of his or her current illegal use of drugs if he or she is otherwise entitled to such services.

"(iv) For purposes of programs and activities providing educational services, local educational agencies may take disciplinary action pertaining to the use or possession of illegal drugs or alcohol against any handicapped student who currently is engaging in the illegal use of drugs or in the use of alcohol to the same extent that such disciplinary action is taken against nonhandicapped students. Furthermore, the due process procedures at 34 CFR 104.36 shall not apply to such disciplinary actions.

"(v) For purposes of sections 503 and 504 as such sections relate to employment, the term 'individual with handicaps' does not include any individual who is an alcoholic whose current use of alcohol prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol abuse, would constitute a direct threat to property or the safety of others.".

(b) Definition of Illegal Drugs. – Section 7 of the Rehabilitation Act of 1973 (29 U.S.C. 706) is amended by adding at the end the following new paragraph:

"(22)(A) The term 'drug' means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act (21 U.S.C. 812).

"(B) The term 'illegal use of drugs' means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act. Such term does not

include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law."

(c) Conforming Amendments. – Section 7(8)(B) of the Rehabilitation Act of 1973 (29 U.S.C. 706(8)(B)) is amended –

(1) in the first sentence, by striking "Subject to the second sentence of this subparagraph," and inserting "Subject to subparagraphs (C) and (D),"; and

(2) by striking the second sentence.

SEC. 513. ALTERNATIVE MEANS OF DISPUTE RESOLUTION. *42 USC 12212.*

Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under this Act.

SEC. 514. SEVERABILITY. *42 USC 12213.*

Should any provision in this Act be found to be unconstitutional by a court of law, such provision shall be severed from the remainder of the Act, and such action shall not affect the enforceability of the remaining provisions of the Act.

Approved July 26, 1990; Amended November 21, 1991.